No. 84-412

Office-Supreme Court, U.S.
FILED
SEP 8 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1984

HOME BUILDERS AND CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC., a Florida corporation, individually and on behalf of all others similarly situated, and Ted Satter Enterprises, Inc., a Florida corporation,

Appellants,

vs.

The BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, Bill Bailey, as Chairman of said Board of County Commissioners, Dennis P. Koehler, Peggy B. Evatt, Frank Foster, and Norman Gregory, as Members of said Board of County Commissioners and George R. Brockway, Building Official of Palm Beach County, Edgar Howell, Building Official of City of Boynton Beach, Roy Reid, Building Official of City of Delray Beach, and Alvin Butterfield, Building Official of Village of Tequesta,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

GROVER C. HERRING
JAMES L. WATT
ARNSTEIN, GLUCK & LEHR
1655 Palm Beach Lakes Blvd.
Suite 904
West Palm Beach, Florida 33401
(305) 689-3900

and

LARRY KLEIN (*Counsel of Record*)
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, Florida 33401
(305) 659-5455

Attorneys for Appellants

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED BY APPEAL

THE COUNTY ORDINANCE REQUIRING PAYMENT OF IMPACT FEES TO RAISE FUNDS TO IMPROVE PUBLIC ROADS DENIES EQUAL PROTECTION BECAUSE OF THE DISPARITY BETWEEN THE PEOPLE WHO BENEFIT AND THE PEOPLE WHO PAY.

THE COUNTY ORDINANCE DENIES EQUAL PROTECTION BECAUSE CITIES, UNDER THE FLORIDA CONSTITUTION, CAN ELECT TO BE EXCLUDED, LEAVING ONLY THOSE IN NON-EXCLUDED CITIES AND IN UNINCORPORATED AREAS OF THE COUNTY TO PAY THE FEES TO IMPROVE ROADS ANYWHERE IN THE COUNTY.

TABLE OF CONTENTS

QUESTIONS PRESENTED I
OPINIONS OR DECISIONS BELOW 1
GROUNDS ON WHICH JURISDICTION IS INVOKED 2
CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED 3
STATEMENT OF THE CASE 3
REASONS FOR PLENARY CONSIDERATION 5
CONCLUSION 11

APPENDIX—

Order of Florida Supreme Court A1
Order of Fourth District Court of Appeal A3
Ordinance No. 79-7 ..... A13
Circuit Court Final Judgment A38
Map A57
Notice of Appeal to U.S. Supreme Court A59

TABLE OF AUTHORITIES

Cases

Associated Home Builders v. Walnut Creek, 4 Cal.3d 633, 484 P.2d 606, 43 ALR 3d 847 9
Louis K. Liggett Co. v. Lee, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929 ..... 7, 8

Other Authorities

Article VIII, Florida Constitution, Section 1(f) 3, 5
Ordinance 79-7, Palm Beach County, Florida 3

No.

In the Supreme Court of the United States

October Term, 1984

HOME BUILDERS AND CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC., a Florida corporation, individually and on behalf of all others similarly situated, and Ted Satter Enterprises, Inc., a Florida corporation,

Appellants,

vs.

The BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, Bill Bailey, as Chairman of said Board of County Commissioners, Dennis P. Koehler, Peggy B. Evatt, Frank Foster, and Norman Gregory, as Members of said Board of County Commissioners and George R. Brockway, Building Official of Palm Beach County, Edgar Howell, Building Official of City of Boynton Beach, Roy Reid, Building Official of City of Delray Beach, and Alvin Butterfield, Building Official of Village of Tequesta,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

OPINIONS OR DECISIONS BELOW

The decision of the Circuit Court for Palm Beach County, the opinion of the Fourth District Court of Appeal, State of Florida, which is reported as *Home Builders v.*

Board of Palm Beach County Commissioners, 446 So.2d 140 (Fla. 4th DCA 1983) and the order denying review by the Florida Supreme Court without opinion, are all contained in the appendix.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Home Builders and Contractors Association of Palm Beach County, Inc. and Ted Satter Enterprises, Inc., individually and as a class action, filed suit in the Circuit Court for Palm Beach County against Palm Beach County and others seeking declaratory and injunctive relief and damages, asserting the ordinance was unconstitutional as a denial of equal protection. The court entered a temporary restraining order prohibiting the county from collecting a fee, to be paid on issuance of building permits to be used to improve roads. Plaintiffs' motion for certification of a class action was granted and the suit has proceeded as a class action.

The case was tried before the court which entered a final judgment holding the ordinance authorizing collection of fees valid. Plaintiffs appealed to the Fourth District Court of Appeal, State of Florida, which upheld the validity of the ordinance in a written opinion reported at 446 So.2d 140. Plaintiffs then sought discretionary review in the Florida Supreme Court based on conflict jurisdiction and a denial of equal protection. The Florida Supreme Court denied review without opinion on June 20, 1984. Petitioners filed their notice of appeal to this Court in the Florida Supreme Court on August 23rd, 1984.

The statute conferring jurisdiction on this Court to review by appeal is 28 U.S.C. Section 1257(2).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

Ordinance 79-7, Palm Beach County, Florida, a copy of which is included in the appendix.

Article VIII, Florida Constitution, Section 1(f), which provides:

> *Non-charter government.* Counties not operating under county charters shall have such power of self-government as if provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.

The equal protection clause of the United States Constitution.

STATEMENT OF THE CASE

Palm Beach County, Florida, adopted an ordinance, included in full in our appendix (A1), known as the "Fair Share Contribution for Road Improvements Ordinance".

The purpose of the ordinance was to raise funds to finance road improvements necessitated by the county's growth with the intent that ". . . new users would only be required to pay the cost of road improvements to the extent that their presence necessitates such improvements".

The ordinance had a formula which took into consideration the costs of road construction and the number of

motor vehicle trips generated by different types of land use and provided for a fee of $300 per unit for single family homes, $200 per unit for multi-family, $175 per unit for mobile homes, and other amounts for commercial and other development, subject to annual review.

The fee is paid by those who pull building permits. The funds are to be used for construction or improvement of roads, bridges and other things incidental to their construction.

The ordinance divided Palm Beach County into 40 separate zones of approximately equal size, which do not coincide with municipal borders. The funds are deposited into 40 separate trust funds which earn interest and shall "be used exclusively within the zones from which they were collected".

Since Palm Beach County is non-charter, cities have the constitutional right to opt out of this ordinance and 33 of the 37 municipalities in Palm Beach County have opted out. Of the 573,000 people living in Palm Beach County, 240,000 live in the 33 exempt municipalities in which the issuance of a building permit does not require payment of the impact fee. The only cities in which fees must be paid are Tequesta, Boynton Beach, Delray Beach and Boca Raton.

The Home Builders and Contractors Association of Palm Beach County, Inc. and Ted Satter Enterprises, Inc., individually and as a class action, filed suit in the Circuit Court for Palm Beach County against Palm Beach County and others seeking declaratory and injunctive relief and damages, asserting the ordinance was unconstitutional as a denial of equal protection. The court entered a temporary restraining order prohibiting the county from collecting a fee, to be paid on issuance of building permits to

be used to improve roads. Plaintiffs' motion for certification of a class action was granted and the suit has proceeded as a class action.

The case was tried before the court which entered a final judgment holding the ordinance authorizing collection of fees valid. Plaintiffs appealed to the Fourth District Court of Appeal, State of Florida, which upheld the validity of the ordinance in a written opinion reported at 446 So.2d 140. That decision expressly held the ordinance did not deny equal protection. Plaintiffs then sought discretionary review in the Florida Supreme Court based on conflict jurisdiction and a denial of equal protection. The Florida Supreme Court denied review without opinion on June 20, 1984.

REASONS FOR PLENARY CONSIDERATION

This impact fee ordinance divides Palm Beach County into 40 zones of approximately 9 square miles each. The ordinance requires anyone pulling a building permit, or engaging in land development activity generating traffic, to pay a fee which will be used to improve the county's major road network system anywhere in that particular zone. The Palm Beach County Engineer testified that the definition of roads in the ordinance would include all county and state roads, and possibly federal roads.

Article VIII, Florida Constitution, Section 1(f) provides as follows:

> *Non-charter government.* Counties not operating under county charters shall have such power of self-government as if provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner

> prescribed by general law, county ordinances not inconsistent with general or special law, *but an ordinance in conflict with a municipal ordinance shall not be effective wtihin the municipality to the extent of such conflict.* (Emphasis supplied)

Palm Beach County is a non-charter county. This means that when Palm Beach County enacts an ordinance, any city which desires not to be affected by the ordinance can pass its own ordinance so providing.

33 of the 37 municipalities in Palm Beach County have passed ordinances in conflict with the county ordinance, thus exempting those cities from the provisions of the ordinance. This means that a person pulling a building permit in any of the 33 to 37 cities in Palm Beach County which have opted out need not pay the impact fee. The only people paying the impact fee are those who live in four cities, Tequesta, Boynton Beach, Delray Beach and Boca Raton, or the people living in unincorporated areas of the county.

The 40 different zones into which the county has been divided do not coincide with municipal boundaries, but are roughly 9 square miles each. We have included a xerox of a portion of a trial exhibit in the appendix, which shows the geographical area of the cities which have opted out of the ordinance in dark shading and some of the zones shown by large dotted lines. There is no relationship between municipal borders and the zones. This particular portion of the exhibit shows the northern portion of Palm Beach County along the east coast.

Zone 1, at the top of this exhibit and at the northern end of Palm Beach County, contains land in the city limits of Tequesta and land in the city limits of Jupiter. A person building a single family home in Tequesta would

pay $300 because Tequesta has not opted out of the ordinance. A person building a single family home in Jupiter, which has opted out, would pay nothing. The $300 is available for use at the unlimited discretion of the county commissioners to improve roads anywhere in zone 1. Thus the money can be used to improve roads anywhere in the zone but only those people in Tequesta pay the impact fee.

Other zones contain portions of cities which have opted out so that the fee is not assessed and unincorporated areas where the fee must be paid. Under the ordinance, the funds may be used to improve roads anywhere in the zone regardless of whether those roads are in the city which has opted out or in the unincorporated area of the county.

There is no relationship between the roughly equal 40 geographical zones of approximately 9 square miles each (with the impact fees to be used to improve roads *anywhere* in the zone) and the 37 cities in Palm Beach County, 33 of which have elected not to have the fee assessed, or the unincorporated areas of the county. Of the 573,000 people living in Palm Beach County, 240,000 live in the 33 exempt municipalities in which the issuance of a building permit does not require payment of the impact fee.

The result is an arbitrary and discriminatory assessment of fees to improve roads which is a denial of equal protection under the Fourteenth Amendment to the United States Constitution. People pulling building permits in unincorporated areas of the county and 4 of 37 cities are assessed funds to be used to improve roads all over the county.

In *Louis K. Liggett Co. v. Lee,* 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929, the State of Florida enacted a law requiring the payment of a license by chain stores or

businesses. The fee or tax increased disproportionately as the number of stores increased, and there was an even greater increase if the stores were located in different counties. Thus, the fees would be materially greater for a company operating ten chain stores in two counties than a company operating ten chain stores in one county.

The law was challenged on the ground it denied equal protection because it discriminated against the operator of a given number of stores in two counties as compared to the operator of the same number of stores in one county. This Court held the statute unconstitutional, stating on pages 533 and 534:

> . . . The addition of a store to an existing chain is a privilege, and an increase of the tax on all the stores for the privilege of expanding the chain cannot be condemned as arbitrary; but an increase in the levy, not only one a new store, but on all the old stores, consequent upon the mere physical fact that the new one lies a few feet over a county line, finds no foundation in reason or in any fact of business experience. There is no more reason for adopting the county line as the measure of the tax than there would be for taking ward lines in cities, or arbitrary lines drawn through the state regardless of county boundaries. . . .

By virtue of the fact that a county ordinance cannot be made to apply to cities if they opt out, the discrimination in the present case is far worse than in the above case. In the above case everyone paid the fee or tax; however, a person whose second store happened to be in another county paid a greater amount than the person whose second store happened to be in the same county as the first store. In the present case the person building a new home in the city which has opted out pays nothing, while

his neighbor, who lives outside the city limits, pays $300 to improve any roads, city, county, state, or federal, anywhere in the 9-square mile zone.

Even without the discrimination resulting from the fact that people in cities which opted out do not have to pay the impact fee there are other reasons why a road impact fee, in general, denies equal protection. The stated purpose of the ordinance is to make new land development activity generating road traffic to pay its share of the anticipated cost of expansion of new roads attributable to the development. Because roads can be traveled on by anyone, not the residents of the zone which are paying the fee, the disparity between those to pay and those who receive the benefit is so great that the ordinance becomes arbitrary and discriminatory. This appears to be the first case anywhere in this country in which an impact fee for roads has been upheld. Impact fees on developers for parks or schools, which are used primarily by the residents of the area, have been upheld in some states and struck down in others. Those cases are collected at 43 ALR 3d 862. The leading case is *Associated Home Builders v. Walnut Creek*, 4 Cal.3d 633, 484 P.2d 606, 43 ALR 3d 847.

In that case the California legislature had passed a statute authorizing cities to require dedication of land or payment of fees in lieu thereof for parks or recreation. The city had passed an ordinance pursuant to the statute and the constitutionality of both was challenged. One of the arguments advanced in that case was that if a city or county could require land to be dedicated for parks or recreation purposes then:

> . . . a city or county could also require contributions for a subdivider for such services as added costs of fire and police protection, the construction of a new

> city hall, or even a general contribution to defray the additional cost of all types of governmental services necessitated by the entry of the new residents.

The California Supreme Court answered:

> This proposition overlooks the unique problem involved in utilization of raw land. Undeveloped land in a community is a limited resource which is difficult to conserve in a period of increased population pressure. The development of a new subdivision in and of itself has the counterproductive effect of consuming a substantial supply of this precious commodity, while at the same time increasing the need for park and recreational land. In terms of economics, subdivisions diminish supply and increase demand. Another answer to Associated's assertion is found in the provisions of section 11546 itself. As we have seen, the section requires *that land dedicated or in-lieu fees are to be used for the recreational needs of the subdivision which renders the exaction.* Since the increase in residents creates the need for additional park land and the land or fees are used for facilities for the new residents, although not to the exclusion of others, *the circumstances may be distinguished from a more general or diffuse need created for such areawide services as fire and police protection.* (Emphasis supplied)

The language of the California Supreme Court indicates it would not have upheld impact fees for roads because there is simply not enough of a relationship between those paying the fee and those using the roads.

CONCLUSION

The road impact fee ordinance is arbitrary and discriminatory and denies equal protection. It is respectfully submitted that this appeal should receive plenary consideration.

Respectfully submitted,

GROVER C. HERRING
JAMES L. WATT
ARNSTEIN, GLUCK & LEHR
1655 Palm Beach Lakes Blvd.
Suite 904
West Palm Beach, Florida 33401
(305) 689-3900

and

LARRY KLEIN
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, Florida 33401
(305) 659-5455
Attorneys for Appellants

APPENDIX

SUPREME COURT OF FLORIDA

WEDNESDAY, JUNE 20, 1984

CASE NO. 64,960

District Court of Appeal, 4th District - No. 82-659
HOME BUILDERS & CONTRACTORS ASSN. OF PALM BEACH COUNTY, INC., et al.,
Petitioners,

v.

BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY,
Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., OVERTON, EHRLICH and SHAW, JJ., concur

BOYD, J., dissents

TC

cc: Hon. Clyde L. Heath, Clerk
Hon. Lewis Kapner, Judge
Hon. John B. Dunkle, Clerk

Grover C. Herring, Esquire
James L. Watt, Esquire
Larry Klein, Esquire
Charles F. Schoech, Esquire
Ross, Hardies, O'Keefe, Babcock & Parsons-Chicago
Ross, Hardies, O'Keefe, Babcock & Parsons-Boca Raton
Nancy E. Stroud, Esquire
Fred P. Bosselman, Esquire
Edward F. Ryan, Esquire
Steven M. Elrod, Esquire
Stephen W. Metz, Esquire

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1983

CASE NO. 82-659

HOME BUILDERS AND CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC., a Florida corporation, individually and on behalf of all others similarly situated, and TED SATTER ENTERPRISES, INC., a Florida corporation,
Appellants,

v.

THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, BILL BAILEY, as Chairman of said Board of County Commissioners, DENNIS P. KOEHLER, PEGGY B. EVATT, FRANK FOSTER, and NORMAN GREGORY, as Members of said Board of County Commissioners; and GEORGE R. BROCKWAY, Building Official of Palm Beach County; EDGAR HOWELL, Building Official of City of Boynton Beach; ROY REID, Building Official of City of Delray Beach; and ALVIN BUTTERFIELD, Building Official of Village of Tequesta,
Appellees.

Opinion filed October 12, 1983

Appeal from the Circuit Court for Palm Beach County; Lewis Kapner, Judge.

Grover C. Herring and James L. Watt of Arnstein, Gluck & Lehr, and Larry Klein, West Palm Beach, for appellants.

Charles F. Schoech, County Attorney, West Palm Beach, and Fred P. Bosselman of Burke, Bosselman, Freivogel, Weaver, Glaves & Ryan, Boca Raton, for appellees.

Stephen W. Metz, Tallahassee, as Amicus Curiae on behalf of Florida Home Builders Association.

DOWNEY, J.

This case involves the validity of a Palm Beach County ordinance imposing an impact fee on new development for the purpose of constructing roads made necessary by the increased traffic generated by such new development.

Appellants, Home Builders and Contractors Association of Palm Beach County, Inc. (hereafter Home Builders), and Ted Satter Enterprises, Inc., filed suit against the Board of County Commissioners of Palm Beach County for declaratory and injunctive relief to invalidate Palm Beach County Ordinance 79-7, as amended, denominated the "Fair Share Contribution for Road Improvements Ordinance." From a final judgment upholding the validity of the ordinance, Home Builders has perfected this appeal.

The Palm Beach 1980 County Comprehensive Plan recognized that in view of the unusual growth rate being experienced in the county and in order to maintain a consistent level of road service and quality of life, extensive road improvements would be necessary, requiring regulation of new development activity which generates additional automobile traffic. The County Commission therefore enacted Ordinance 79-7 in order to finance the necessary road capital improvements and to regulate increases in traffic levels. The ordinance would require any new

land development activity generating road traffic to pay its "fair share" of the reasonably anticipated cost of expansion of new roads attributable to the new development.

The ordinance has a formula which takes into consideration the costs of road construction and the number of motor vehicle trips generated by different types of land use. It provides for a fee of $300 per unit for single family homes, $200 per unit for multi-family, $175 per unit for mobile homes with other amounts for commercial or other development, all subject to annual review. The fee is to be paid upon commencement of any new land development activity generating traffic. The ordinance divides the county into forty zones, indicated on a map incorporated by reference into the ordinance, and establishes a trust fund for each zone. Funds collected from building activity in a particular zone may only be spent in that zone, and must be spent within a reasonable time after collection (not later than six years) or returned to the present owner of the property.

The briefs of the parties and amicus present the following questions for resolution:

1. Whether Palm Beach County has authority to impose an impact fee on new development for the construction of public roads.

2. Whether the proposed ordinance violates the equal protection clauses of the Constitutions of the United States and State of Florida.

3. Whether the ordinance imposes a regulatory fee or a tax.

In a well considered final judgment the trial judge either expressly or impliedly answered the foregoing questions adversely to appellants.

I.

The initial question which must be answered is the challenge to the county's authority to enact an ordinance of this kind. Palm Beach County is a non-charter county, and thus we must look to Article VIII, Section 1(f) of the Florida Constitution and various enabling statutes to resolve the scope of the county's authority in this area.

Article VIII, Section 1(f), Florida Constitution, provides:

> (f) NON-CHARTER GOVERNMENT. Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.

Ordinance 79-7, the ordinance in question, expressly cites as authority for the enactment of that legislation Sections 125.01 and 163.3161, Florida Statutes. Section 125.01(1) (m) & (w), Florida Statutes (1981), provide:

> (1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power shall include, but shall not be restricted to, the power to:
>
> . . . .
>
> (m) Provide and regulate arterial, toll, and other roads, bridges, tunnels and related facilities; eliminate grade crossings; provide and regulate park-

> ing facilities; and develop and enforce plans for the control of traffic and parking.
>
> . . . .
>
> (w) Perform any other acts not inconsistent with law which are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.

In addition, Section 163.3161, Florida Statutes, known as the Local Government Comprehensive Planning Act, contains a broad grant of power for local governments to enact plans and programs to guide and control future development.

The Supreme Court of Florida in *Speer v. Olson*, 367 So.2d 207, 210-11 (Fla. 1979), characterized the legislative intent in enacting Chapter 125 as follows:

> The intent of the Legislature in enacting the recent amendments to Chapter 125, Florida Statutes, was to enlarge the powers of counties through home rule to govern themselves.
>
> The first sentence of Section 125.01(1), Florida Statutes, (1975), grants to the governing body of a county the full power to carry on county government. Unless the Legislature has pre-empted a particular subject relating to county government by either general or special law, the county governing body, by reason of this sentence, has full authority to act through the exercise of home rule power.

The court went on to point out that one of the legislative purposes of passing Chapter 125 was to enable local governments to govern themselves without the necessity of running to the legislature every year for authority to act (*citing State v. Orange County*, 281 So.2d 310 (Fla. 1973)).

We know of no general or special act which purports to limit the grant of authority contained in the foregoing constitutional and statutory enactments nor is the ordinance inconsistent with any general or special law. Art. VIII, sec. 2(f), *Fla. Const.* Accordingly, we hold that Palm Beach County had the power and authority to enact the fee impact ordinance in question, assuming the ordinance involves a regulatory fee rather than a tax.

II.

Home Builders contends the ordinance is invalid because of the disparity between the people who benefit and the people who pay. As stated in its brief:

> Our position is that since anyone can drive a vehicle over any of these roads, regardless of whether he lives in the zone or has paid the impact fee, there is too great a disparity between those who pay and those who receive the benefit, making the charge in reality a tax, which the county does not have the power to impose.

If by that argument it is Home Builders' position that the benefits accruing from roads constructed with the impact fees collected must be used exclusively or overwhelmingly for the subdivision residents in question, we would have to differ. It is difficult to envision any capital improvement for parks, sewers, drainage, roads, or whatever, which would not in some measure benefit members of the community who do not reside in or utilize the new development. For example, landowners abutting a subdivision may well derive substantial benefit from intrasubdivision drainage facilities. Parks within subdivisions are not restricted to subdivision residents only. Furthermore, intrasubdivision streets and roads may be extensively used by persons not residents thereof.

A resume of the decisions in this and other jurisdictions demonstrates that those attacking impact fees often rely upon this same argument; it is one frequently found and generally rejected. In *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979), *on rehearing* 614 P.2d 1257 (1980), the appellant contended that an ordinance requiring a developer to contribute seven percent of the development land, or a fee in lieu thereof for public use for flood control, parks, or recreation areas was invalid because, among other things, the land dedicated or the fees paid would not be used solely for the benefit of the subdivision in question and that nonresidents of the subdivision and of the county would be using the improvements also. The Supreme Court of Utah rejected this contention, and held that it is sufficient if the improvements constructed with the fees imposed bear a reasonable relationship to the needs created by the subdivision. *Call, supra,* at 220. Similar arguments met the same fate in the oft cited case of *Associated Home Builders v. City of Walnut Creek,* 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606 (1977), and in the case of *Ayres v. City Council of City of Los Angeles,* 34 Cal.2d 31, 207 P.2d 1 (1949). Our recent decision in *Hollywood, Inc. v. Broward County,* 431 So.2d 606 (Fla. 4th DCA 1983), also supports a holding that benefit accruing to the community generally does not adversely affect the validity of a development regulation ordinance as long as the fee does not exceed the cost of the improvements required by the new development and the improvements adequately benefit the development which is the source of the fee.

III.

Next Home Builders contends that the fair share ordinance is arbitrary and discriminatory and thus violates the equal protection provisions of the Federal and

State Constitutions. The thrust of the argument is that since municipalities may "opt out" of the ordinance under Article VIII, Section 1(f) of the Florida Constitution, and thirty-three of the thirty-seven municipalities in the county have opted out, equal protection is denied to those subject to the ordinance.

We disagree. Using the rational basis test articulated in *In re Estate of Greenberg*, 390 So.2d 40 (Fla. 1980), we believe the evidence demonstrates that the ordinance bears a reasonable relationship to a legitimate state purpose. The Florida Constitution itself provides that county ordinances of non-charter counties shall not be effective in a municipality if it conflicts with a municipal ordinance. Surely that in itself should not render all non-charter county regulatory fees ineffective or impact fees could only be allowed in charter counties. Furthermore, the fact that an impact fee is payable on land located in the county whereas it would not be payable on nearby land in a municipality which has opted out does not offend equal protection. Unequal or different charges or fees assessed in incorporated and unincorporated areas, like different hours for retail liquor sales and other areas of regulation which may lack uniformity, are not improper where such legislation is otherwise a valid exercise of governmental power. As the court said in *Wednesday Night, Inc. v. City of Fort Lauderdale*, 272 So.2d 502, 505 (Fla. 1973):

> Insofar as concerns equal protection, it is well settled that the Constitution of the United States does not prohibit legislation which is limited to the territory within which it is to operate. The constitution guaranty of equal protection of laws does not require territorial uniformity. See Ocampo v. United States, 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed 1231, and McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393.

In addition, we would observe that for aught we know any of these municipalities which have opted out may themselves one day enact impact fees, which will tend to lessen the ostensible unequal treatment of land development in different areas.

IV.

Finally, appellants maintain that the ordinance is a tax rather than a regulatory fee and thus in violation of Article VII, Section 1(a) of the Florida Constitution. In all candor we concede this is the most difficult point raised in this appeal. As one reads the various cases involving the dichotomy between a fee and a tax the distinction almost seems to become more amorphous rather than less. In any event, some years ago this court decided *Broward County v. Janis Development Corp.*, 311 So.2d 371 (Fla. 4th DCA 1975), and held that a county ordinance imposing an impact fee for roads was in reality a tax rather than a fee. Appellants naturally rely heavily upon *Janis* to support their argument that this ordinance is a tax in sheep's clothing and that impact fees and roads are simply not compatible. However, the problem with the *Janis* ordinance was not that it involved an impact fee for roads (as opposed to parks or drainage, etc.) but rather that the legislation had several inherent defects. For example, the money generated by the ordinance far exceeded the cost of meeting the needs brought about by the new development. In addition, the ordinance was lacking in specific restrictions regarding the use of revenue received. These are the features which required this court to hold it was not dealing with a regulatory fee. The amount and use of the funds simply did not jibe with the concept of regulation; it smacked more of revenue raising which is descriptive of a tax.

In *Contractors & Builders Ass'n of Pinellas County v. City of Dunedin*, 329 So.2d 314 (Fla. 1976), *cert. denied* 444 U.S. 867 (1979), and *Hollywood, Inc., supra*, the supreme court and this court pointed out the features of the *Janis* ordinance which kept it from passing muster as an acceptable impact fee oridnance. Consequently, the Palm Beach County ordinance in question here was crafted with *Dunedin's* lessons in mind. The present ordinance recognizes that the rapid rate of new development will require a substantial increase in the capacity of the county road system. The evidence shows that the cost of construction of additional roads will far exceed the fair share fees imposed by the ordinance. In fact the county suggests that under the ordinance the cost will exceed the revenue produced by eighty-five percent. The formula for calculating the amount of the fee is not rigid and inflexible, but rather allows the person improving the land to determine his fair share by furnishing his own independent study of traffic and economic data in order to demonstrate that his share is less than the amount under the formula set forth in the ordinance. Lastly, expenditure of the funds collected is localized by virtue of the zone system.

Thus, it appears that the Palm Beach County ordinance meets the tests laid down in *Dunedin* and followed in *Hollywood, Inc.*, which supports the trial judge's findings that the ordinance imposes a regulatory fee and not a prohibited tax. We would sum up this point by quoting from an informative article by Juergensmeyer and Blake entitled *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 Fla. St. U.L. Rev. 415, 440-41, wherein it is said:

> The appropriate framework for determining whether an impact fee is a regulation or a tax is one

> of public policy in which a number of factors should be weighed. The home rule powers granted local governments in Florida, the legislative mandate that local governments must plan comprehensively for future growth, and the additional broad powers given them to make those plans work effectively, indicate that properly limited impact fees for educational or recreational purposes should be construed as regulations. Characterization as a regulation is particularly appropriate where an impact fee is used to complement other land use measures such as in lieu fees or dedications. If an impact fee is characterized as a regulation, its validity should then be determined by reference to the dual rational nexi police power standard.[1]

Although the foregoing quote is by its own terms limited to fees for educational and recreational purposes, we see no reason why it could not have included roads.

For the foregoing reasons, we affirm the judgment appealed from.

AFFIRMED.

LETTS, J., and GOLDMAN, MURRAY, Associate Judge, concur.

ORDINANCE NO. 79-7

A COMPOSITE OF ORDINANCE #79-7 AS AMENDED BY ORDINANCE #81-4

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY,

---

1. This standard requires an analysis of regulatory fees similar to that adopted by this court in *Hollywood, Inc., supra.*

FLORIDA, AMENDING ORDINANCE NO. 79-7 KNOWN AS THE "FAIR SHARE CONTRIBUTION FOR ROAD IMPROVEMENTS ORDINANCE" BY INCLUDING REFERENCE TO THE PALM BEACH COUNTY COMPREHENSIVE LAND USE PLAN; BY AMENDING THE LANGUAGE WHICH SPECIFIES PALM BEACH COUNTY'S AUTHORITY TO ENACT THE FAIR SHARE ORDINANCE; BY AMENDING THE SECTION ALLOWING FOR A REFUND OF THE FAIR SHARE FEE; BY AMENDING THE MAP DEFINING DESIGNATED ZONE SO AS TO MORE SPECIFICALLY AND CLEARLY DEFINE THE ZONES; AND BY AMENDING SEVERAL TECHNICAL PROVISIONS OF THE ORDINANCE SO AS TO IMPROVE THE ORDINANCE'S CLARITY AND ADMINISTRATION; PROVIDING FOR LIBERAL CONSTRUCTION AND SEVERABILITY; PROVIDING FOR INCLUSION IN THE CODE; AND, PROVIDING AN EFFECTIVE DATE.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA that Ordinance No. 79-7 known as the "Fair Share Contribution for Road Improvement Ordinance" is amended as follows:

SECTION I. Short Title, Authority and Applicability.

A. This ordinance shall be known and may be cited as the "Fair Share Contribution for Road Improvements Ordinance."

B. The Board of County Commissioners has authority to adopt this ordinance *through general non-charter county home rule powers* pursuant to Article VIII of the 1968 Florida Constitution, and Chapters 125 and 163 Florida Statutes.

C. *Increasing the capacity of arterial and other roads to make them safe and more efficient, in coordination with a plan for the control of traffic, is the recognized responsibility of the County through Section 125.01(m) Florida Statutes, and is in the best interest of the public's health, safety, and welfare.*

D. *Planning for the necessary expansion of new roads and roadway improvements created by new land development activity generating traffic through the comprehensive planning process, and the implementation of these plans, is a mandatory responsibility of the County through Section 163.3161 et seq., Florida Statutes, and is in the best interest of the public's health, safety, and welfare.*

E. This ordinance shall apply to the unincorporated area of Palm Beach County, and to the incorporated areas of Palm Beach County to the extent permitted by Article VIII, Section 1(f) of the 1968 Constitution.

SECTION II. Intent and Purpose.

A. The Board of County Commissioners has determined *and recognized through adoption of the 1980 Palm Beach County Comprehensive Plan* that the phenomenal growth rate which the County is experiencing will necessitate extensive road network improvements *and make it necessary to regulate new land development activity generating traffic* in order to maintain a similar level of road service and quality of life in Palm Beach County. *In order to finance the necessary new capital improvements and regulate traffic generation levels, several combined methods of financing will be necessary, one of which will require new land development activity generating traffic to pay a "Fair Share Fee" which does not exceed a pro rata share of the reasonably anticipated expansion costs of new roads and other facilities.*

B. *Providing and regulating arterial and other roads and related facilities to make them more safe and efficient, in coordination with a plan for the control of traffic is the recognized responsibility of the County through Section 125.01(m), Florida Statutes, and is in the best interest of the public's health, safety, and welfare.*

C. *Implementing a regulatory scheme that requires new land development activity generating traffic to pay a "Fair Share Fee" that does not exceed a pro rata share of the reasonably anticipated expansion costs of new roads created by the new land development activity, is the responsibility of the County in order to carry out the traffic circulation element of its Comprehensive Plan, under Section 163.3161 et seq., Florida Statutes, and is in the best interest of the public's health, safety, and welfare.*

D. *It is the purpose of this ordinance to establish a regulatory system to assist in providing increased capacity for the major road network system to accommodate the increased demand new land development activity generating traffic will have on the road system. New land development activity will be required to pay a fee which does not exceed a pro rata share of the reasonably anticipated costs of new roads and other facilities that its presence necessitates. This is accomplished by requiring payment of Fair Share Fees upon commencement of any new land development activity generating traffic. This road impact fee is for the exclusive purpose of providing increased capacity for the major road network system.*

E. It is in the interest of the public's health, safety, welfare, and convenience for the County to regulate land development, *arterial and other roads and other related facilities by requiring payment of Fair Share Fees upon commencement of any new land development activity generating traffic.*

F. *Under the adopted Comprehensive Plan new development at urban densities can be permitted only where an adequate road network system exists. The purpose of this ordinance is to continue to enable Palm Beach County to allow new development in compliance with the adopted Comprehensive Plan, and to regulate new development activity generating traffic so as to require it to share in the burdens of growth by paying its pro rata share for the reasonably anticipated expansion costs of road improvements. Thus, new growth will help pay for itself, and the existing residents of the Palm Beach County will not have the full financial burden of providing increased road capacity at the outset.*

G. *It is not the purpose of this ordinance to collect any money from new land development activity generating traffic, in excess of the actual amount necessary to offset the demand on the major road network system generated by the new land development activity.* It is specifically acknowledged this ordinance has approached the problem of determining the "Fair Share Fee" in a conservative and reasonable manner. This ordinance will only partially recoup the governmental expenditures associated with growth. Established residents will still be required to bear their appropriate share of the cost of the road network system.

H. The Technical Data, Findings and Conclusions herein are based *on the Palm Beach County 1980 Comprehensive Plan* and in part on the following studies and reports:

Report on the proposed Palm Beach County Fair Share Contribution for Road Improvements Ordinance - August 10, 1978, revised September 8, 1978 by Palm Beach County Engineering, Planning and Legal Staffs.

Economic Aspects of the Proposed Palm Beach County Road Impact Fee Ordinance - January 2, 1979 by Joint Center for Environmental and Urban Problems Fla. International University and Florida Atlantic University; West Palm Beach Urban Area Transportation Study Plan Reevaluation (Year 2000 Study) - May 17, 1979 - by Peat, Marwick & Mitchell Company; Update Study of Vehicular Traffic Generation Characteristics in Palm Beach County - Jan. 1975 - by Kimley-Horn & Associates; Trip Generation & Information Report - 1976 - by Institute of Transportation Engineers; Trip Ends Generation Research 1979 by State of Fla. D.O.T., Division of Transportation Planning.

SECTION III. Rules of Construction.

For the purposes of administration and enforcement of this ordinance, unless otherwise stated in this ordinance, the following rules of construction shall apply to the text of this ordinance:

(1) In case of any difference of meaning or implication between the text of this ordinance and any caption, illustration, summary table, or illustrative table, the text shall control.

(2) The word "shall" is always mandatory and not discretionary; the word "may" is permissive.

(3) Words used in the present tense shall include the future; and words used in the singular number shall include the plural, and the plural the singular, unless the context clearly indicates the contrary.

(4) The phrase "used for" includes "arrange for", "designed for", "maintained for" or "occupied for".

(5) The word "person" includes an individual, a corporation, a partnership, an incorporated association, or any other similar entity.

(6) Unless the context clearly indicates the contrary, where a regulation involves two (2) or more items, conditions, provisions, or events connected by the conjunction "and", "or" or "either . . . or", the conjunction shall be interpreted as follows:

(a) "And" indicates that all the connected terms, conditions, provisions or events shall apply.

(b) "Or" indicates that the connected items, conditions, provisions or events may apply singly or in any combination.

(c) "Either . . . or" indicates that the connected items, conditions, provisions or events shall apply singly but not in combination.

(7) the word "includes" shall limit a term to the specific example but is intended to extend its meaning to all other instances or circumstances of like kind or character.

(8) *Where a road right of way is used to define zone boundaries, that portion of the road right of way demarcating the boundary may be considered as part of any zone it bounds.*

SECTION IV. Definitions.

A. Accessory Building or Structure: A detached, subordinate building, the use of which is clearly incidental and related to that of the principal building or use of the land, and which is located on the same lot as that of the principal building or use.

B. Arterial Road: A road which is a main traffic artery carrying relatively high traffic volumes for relatively long distances. This classification includes all roads which function above the level of a collector road.

C. Building: Any structure, either temporary or permanent, having a roof and used or built for the enclosure or shelter of persons, animals, vehicles, goods, merchandise, equipment, materials or property of any kind. This term shall include tents, trailers, mobile homes, or any vehicles serving in any way the function of a building.

[D. Building Permit: An official document or certificate issued by the authority having jurisdiction, authorizing the construction of any building. The term shall also include tie-down permits for those structures or buildings that do not require a building permit, such as a mobile home, in order to be occupied.]

E. Capacity: The maximum number of vehicles for a given time period which a road can safely and efficiently carry, usually expressed in terms of vehicles per day. For the purpose of this ordinance the capacity of a road shall be 6000 vehicles per day per through lane.

F. Collector Road: A road which carries traffic from local roads to arterial roads. Collector roads have more continuity, carry higher traffic volumes, and may provide less access than local roads.

G. *Collecting Agency: The governmental authority having jurisdiction to authorize the making of any material change of any structure including the construction, enlargement, alteration, or repair of buildings, or the governmental authority having jurisdiction to authorize rezoning or special exceptions that make material changes in the use or appearance of land without making material changes of any structures on the land.*

H. Dwelling Unit: *Dwelling Unit shall have the meaning defined in §200.2 of the Zoning Code.*

I. External Trip: Any trip which either has its origins from or its destination to the development site and which impacts the major road network system.

J. Fair Share Fee; Road Impact Fee; or Fee: The fee required to be paid in accordance with this ordinance.

K. Internal Trip: A trip which has both its origin and destination within the development site.

L. *Land Development Activity Generating Traffic: The carrying out of any building activity or the making of any material change in the use or appearance of any structure or land that attracts or produces vehicular trip(s) over and above that produced by the existing use of the land.*

M. Local Road: A road designed and maintained primarily to provide access to abutting property. A local road is of limited continuity and is not for through traffic.

N. Major Road Network System: All arterial and collector roads within Palm Beach County, including new arterial and collector roads necessitated by land developments.

O. *Non commencement: The cancellation of construction activity making a material change in a structure, or the cancellation of any other land development activity making a material change in the use or appearance of land.*

P. Planned Development: A land area under unified control designed and planned to be developed in a single operation by a series of prescheduled development phrases according to an officially approved final Master Land Use Plan, including Planned Unit Developments, Planned Commercial Developments and similar planned developments.

Q. Site Related Improvements: Road construction or road improvements at or near the development site

which are necessary to interface the development's external trips with the major road network system or which are necessary to interface the development's internal trips with the major road network system where a portion of the major road network system is included within the development.

R. Traffic Impact Analysis: A study prepared by a qualified professional engineer, licensed to practice within the State of Florida, to determine the vehicular impact of the development upon the major road network system. This study includes, but is not limited to: determination of trip generation; trip distribution; traffic assignment; capacity analyses; and, improvements to the roadway system necessitated by the development, such as required new roads, additional laneage and signalization.

S. Trip: A one-way movement of vehicular travel from an origin (one trip end) to a destination (the other trip end). For the purposes of this ordinance, trip shall have the meaning which it has in commonly accepted traffic engineering practice and which is substantially the same as that definition in the previous sentence.

T. Trip Generation: The attraction or production of trips caused by a given type of land development.

U. *Traffic Generation Statement: A documentation of proposed trip generation rates submitted prior to and as a part of a traffic impact analysis. This documentation would include actual traffic generation information from a representative sampling of existing similar development.*

V. Zone: Those geographical areas as identified on the attached Exhibit "A".

SECTION V. Fair Share Fee to be Imposed on New Land Development Activity Generating Traffic; Review.

A. *It has been determined by the Board of County Commissioners that any new land development activity generating traffic in the County should be charged a reasonable "Fair Share Fee" to help regulate new land development activity's effect on roads and related facilities.*

B. *After the effective date of this ordinance, the applicant shall pay a Fair Share Fee in the amount and manner required by this ordinance upon commencement of any new land development activity generating traffic. The Fair Share Fee shall be used exclusively within the zone in which the development is located for the exclusive purposes set forth in this ordinance.*

C. The Fair Share Fee shall be determined by using the following methods:

1. Independent Calculation: Any person may determine his Fair Share Fee by providing traffic and economic documentation that his economic impact on the major road network system is less than the Fair Share Fee as determined under subparagraphs C 2, 3 and 4 below. The documentation submitted shall show the basis upon which the Fair Share Fee has been calculated, including but not limited to *the following factors*:

a. *Documentation of trip generation rates as appropriate for the proposed land development activity.*

b. *Bases for trip distribution and traffic assignment.*

c. *Estimates of the cost to replace the portion of the design capacity used by the traffic generated by*

the proposed land development activity on each of the affected roads (this cost shall include consideration of a reasonable inflation rate, right-of-way costs, plans preparation costs and other cost which may reasonably be expected for the necessary road improvements.

d. *Tax revenues derived from the proposed land development activity which can reasonably be projected to be available for these capacity replacement costs.*

e. *The amount of any shortfall of these projected revenues when compared to the required capacity replacement costs.*

This documentation shall be prepared and presented by qualified professionals in the respectvie fields and must be based on studies, surveys, and reports using standard practices and accepted methodological procedures. The mathematical assumption formulas and generation rates used in this ordinance shall not be used as a basis without independent documentation.

2. Fair Share Formula(s):

a. The following Fair Share Formula(s) may be used for those planned developments for which a traffic impact analysis has been prepared for the purposes of determining the external trips imposed by the development on the major road network system. The Official Daily Trip Generation Rate as shown in subparagraph C.3.a. and b. shall be used as the basis for calculating the total external trips for a planned development. The County Engineer shall review the traffic impact analysis and determine the Fair Share Fee to be paid in accordance with the formula(s) established in C.2.b. Any applicant may challenge the County Engineer's determination of the fee by filing a petition with the Board of County Commission-

ers to determine the appropriate Fair Share Fee within sixty (60) days of the determination by the County Engineer.

b. The cost to construct one (1) lane of roadway for one (1) miles shall be Three Hundred Thousand Dollars ($300,000.00) and the cost to construct one (1) lane of roadway for one-half (1/2) mile shall be One Hundred Fifty Thousand Dollars ($150,000.00).

Residential:

$$\frac{\text{External Trips} \div 2^*}{\text{Capacity of 1 lane}} \times \begin{array}{l}\text{Cost to construct} \\ \text{1 lane for 1 mile} \\ = \text{Fair Share Fee}\end{array}$$

*Given a 50/50 directional split.

Non-Residential:

$$\frac{\text{External Trips} \div 2^*}{\text{Capacity of 1 lane}} \times \begin{array}{l}\text{Cost to construct} \\ \text{1 lane for 1/2 mile} \\ = \text{Fair Share Fee}\end{array}$$

*Given a 50/50 directional split.

3. Fee Schedule: The following fee schedule is presented for those developments for which a traffic impact analysis has not been prepared. The following fees have been calculated using the formula(s) presented in paragraph C.2.b. using accepted trip generation rates for each land use as observed in Palm Beach County or trip generation rates based upon acceptable state and national averages. For the convenience of the public the fees which are based on trip generation have been converted to a dollar amount and based on dwelling unit, building square footage, bed, parking space, or room depending upon the particular land use.

a. Residential:

Type of Land Development Activity	Official Daily Trip Generation Rate	Fee
Single Family House	12 per dwelling unit	$300 per unit
Multi-family/ Townhouse Dwelling	8 per dwelling unit	$200 per unit
Mobile Home	7 per dwelling unit	$175 per unit

b. Non-Residential:

Type of Land Development Activity	Official Daily Trip Generation Rate	Fee
General Office Building	20 per 1000 sq. ft.	$ 250 per 1000 sq. ft.
Office Building, Medical	75 per 1000 sq. ft.	937 per 1000 sq. ft.
Hospital	15 per bed	187 per bed
Nursing Home	3 per bed	37 per bed
General Commercial	100 per 1000 sq. ft.	1,250 per 1000 sq. ft.
Warehouse	5 per 1000 sq. ft.	62 per 1000 sq. ft.
Motel	15 per room	187 per room
General Recreational	3 per parking space	37 per parking space

Shopping Centers:

(Square Footage)	(Fee)	(Rate of Fee per) sq. ft.
20,000 sq. ft.	$25,000	($1.25/sq. ft.)
40,000 sq. ft.	$50,000	($1.25/sq. ft.)
60,000 sq. ft.	$75,000	($1.25/sq. ft.)
80,000 sq. ft.	$100,000	($1.25/sq. ft.)
100,000 sq. ft.	$106,475	($1.06/sq. ft.)
150,000 sq. ft.	$122,650	($0.82/sq. ft.)
200,000 sq. ft.	$138,829	($0.69/sq. ft.)
250,000 sq. ft.	$155,008	($0.62/sq. ft.)
300,000 sq. ft.	$171,186	($0.57/sq. ft.)
350,000 sq. ft.	$187,365	($0.54/sq. ft.)
400,000 sq. ft.	$203,544	($0.51/sq. ft.)
450,000 sq. ft.	$219,723	($0.49/sq. ft.)
500,000 sq. ft.	$235,902	($0.47/sq. ft.)
600,000 sq. ft.	$268,259	($0.45/sq. ft.)
700,000 sq. ft.	$300,616	($0.43/sq. ft.)
800,000 sq. ft.	$332,974	($0.42/sq. ft.)
900,000 sq. ft.	$365,332	($0.41/sq. ft.)
1,000,000 sq. ft.	$397,689	($0.40/sq. ft.)
1,250,000 sq. ft.	$478,583	($0.38/sq. ft.)
1,500,000 sq. ft.	$559,476	($0.37/sq. ft.)
General Industrial	6 per 1000 sq. ft.	75 per 1000 sq. ft.

4. *Other Land Development Activity*: For new *land development activity* not electing to proceed under subparagraph C.1. above, and where the County Engineer has determined that the development is not covered by subparagraphs C.2. and 3. above, the appropriate traffic generation rate and thus the fee to be paid in accordance with this ordinance shall be determined by the County Engineer. *The County Engineer shall rely on the best available traffic generation data and traffic literature, and*

shall compute the fee in accordance with C.2.b. The applicant may challenge the County Engineer's determination provided he submits to the County Engineer's Office a traffic generation statement prepared by a qualified Professional Engineer who is licensed to practice in the State of Florida. If the County Engineer's Office rejects this proposed generation rate, then the applicant may petition the Board of County Commissioners to determine the appropriate Fair Share Fee within sixty (60) days of the rejection of the proposed generation rate by the County Engineer.

D. Review. The amount of the Fair Share Fee shall be reviewed by the Board of County Commissioners in January, 1981; and thereafter the amount of the Fair Share Fee shall be reviewed annually during the month of January by the Board of County Commissioners. The review shall consider trip generation rates, and actual construction costs for work contracted for by the county and the Florida Department of Transportation within Palm Beach County. The purpose of this review is to analyze the effects of inflation on the actual costs of roadway construction and to insure the fee charged *new land development activity generating traffic* will not exceed their pro rata share for the reasonably anticipated expansion costs of road improvements necessitated solely by their presence.

SECTION VI. Time of Payment.

A. *The Fair Share Fee shall be due on commencement of any new land development activity generating traffic.* All funds collected shall be properly identified by zone and promptly transferred to the Palm Beach County Comptroller's Office for deposit in the appropriate trust fund to be held in separate accounts as determined in Section

VIII of this ordinance and used solely for the purpose as established by this ordinance.

B. The Collecting Agency shall be entitled to retain two percent (2%) of the total funds collected to offset the costs associated with collection of these funds.

SECTION VII. Use of Funds Collected.

A. The funds collected by reason of the establishment of a road impact fee in accordance with this ordinance shall be used solely for the purpose of construction or improving roads, streets, highways, and bridges on the major road network system including but not limited to:

1. design and construction plan preparation,
2. right of way acquisition,
3. construction of new through lanes,
4. construction of new turn lanes,
5. construction of new bridges,
6. construction of new drainage facilities in conjunction with new roadway construction,
7. purchase and installation of traffic signalization,
8. construction of new curbs, medians and shoulders, and
9. relocating utilities to accommodate new roadway construction.

All funds shall be used exclusively within the zones from which they were collected. Said funds shall not be used to maintain the existing major road network system.

SECTION VIII. Trust Funds Established.

A. There are hereby established forty (40) separate trust funds, one for each zone as shown on Exhibit "A" attached hereto and incorporated herein by reference.

B. *Funds withdrawn* from these accounts must be used solely in accordance with the provisions of Section VII of this ordinance *and in compliance with the 1980 Palm Beach County Comprehensive Plan. The disbursal of such funds shall require the* approval of the Board of County Commissioners, after recommendation of the County Engineer.

C. Any funds on deposit not immediately necessary for expenditure shall be invested in interest bearing sources. All income derived shall be deposited in the applicable trust account.

D. The fees collected pursuant to this ordinance may be returned to the then present owner of the *land development activity generating traffic* if the fees have not been spent (encumbered) within a *reasonable time, but not later than* by the end of the calendar quarter immediately following six (6) years from the date the fees were paid. Refunds shall be made in accordance with the following procedure:

1. The present owner must petition the Board of County Commissioners for the refund within one (1) year following the end of the sixth (6th) year from the date on which the fee was paid.

2. The petition must be submitted to the County Engineer and must contain:

a. a notarized sworn statement that the petitioner is the current owner of the property;

b. a copy of the dated receipt issued for payment of the fee;

c. a certified copy of the latest recorded deed; and,

d. a copy of the most recent ad valorem tax bill.

3. Within three (3) months from the date of receipt of a petition for refund the County Engineer will advise the petitioner and the Board of County Commissioners of the status of the fee requested for refund. For the purposes of this section, fees collected shall be deemed to be spent (encumbered) on the basis of the first fee in shall be the first fee out. In other words, the first money placed in a trust fund account shall be the first money taken out of that account when withdrawals have been made in accordance with subparagraph B, above.

4. When the money requested is still in the trust fund account and has not been spent (encumbered) by the end of the calendar quarter immediately following six (6) years from the date the fees were paid, the money shall be returned with interest at the rate of six percent (6%) per annum.

E. The fees collected pursuant to this ordinance may be returned to the present owner *if the land development activity generating traffic* is cancelled due to *noncommencement of construction before the funds have been committed or spent pursuant to Section VII.* Refunds may be made in accordance with Section VIII, D, 2 and VIII, D, 3, provided the then present owner petitions the Board of County Commissioners for the refund within three (3) months from the date of *noncommencement.*

SECTION IX. Exemption and Credits.

A. The following shall be exempted from payment of the Fair Share Fee:

1. Alterations or expansion of an existing dwelling unit where no additional units are created *and the use is not changed.*

2. The construction of accessory buildings or structures which will not increase the traffic counts associated with the principal building or the land.

3. The replacement of a destroyed or partially destroyed building or structure with a new building or structure of the same size and use.

4. The construction of publicly-owned governmental buildings.

B. Credits:

1. In lieu of paying the Fair Share Fee, *a* developer may elect to construct part of a major road network system which is in addition to his site related improvements. The developer shall submit the proposed construction which he intends to do along with a certified cost estimate to the County Engineer. The County Engineer shall determine if the proposed construction is an appropriate substitute for the road impact fee and the amount of credit to be given and the timetable for completion.

2. Where a proposed major network road runs through a development and where the developer is only required to construct two (2) lanes of the roadway, the developer may elect, upon submission of a certified cost estimate and approval of the County Engineer, to construct more than two (2) lanes and receive credit to the extent of the additional lanes constructed.

3. The developer may challenge any determination made by the County Engineer pursuant to subparagraph B.1. and .2. above by filing a petition with the Board of County Commissioners.

SECTION X. "Sunset" Provision.

A. This ordinance shall "sunset" or cease to exist four (4) years from its effective date, unless renewed by an affirmative vote of the Board of County Commissioners.

B. In the event that this ordinance is allowed to "sunset" by the Board, any and all funds collected during the life of the ordinance shall continue to be disposed of in the manner set forth in Sections VII and VIII, as if this ordinance were still in effect.

SECTION XI. Liberal Construction, Severability and Penalty Provisions.

A. The provisions of this ordinance shall be liberally construed to effectively carry out its purposes in the interest of public health, safety, welfare and convenience.

B. If any section, phrase, sentence or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions thereof.

[C. *Any building permit used for new construction as covered by this ordinance but without payment of the fee as required by this ordinance shall be void.*]

C. A violation of this ordinance shall be a misdemeanor punishable according to law; however, in addition to or in lieu of any criminal prosecution Palm Beach

County or any individual paying the Fair Share Fee shall have the power to sue in civil court to enforce the provisions of this ordinance.

SECTION XII. Inclusions in the Code.

The provisions of this ordinance shall become and be made a part of the Code of Laws and Ordinances of Palm Beach County, Florida. The sections of this ordinance may be renumbered or relettered to accomplish such; and the word "ordinance" may be changed to "section", "article", or another appropriate word.

SECTION XIII. Effective Date.

The provisions of this ordinance shall become effective on July 1, 1979.

SECTION XIV. Severability.

A. The provisions of this ordinance shall be liberally construed to effectively carry out its purposes in the interest of public health, safety, welfare and convenience.

B. If any section, phrase, sentence or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions thereof.

APPROVED AND ADOPTED BY THE BOARD OF COUNTY COMMISSIONERS of Palm Beach County, Florida, on the ..... day of ....., 19.....

PALM BEACH COUNTY, FLORIDA, BY ITS BOARD OF COUNTY COMMISSIONERS

By: .....
Chairman

Acknowledged by the Department of State, State of Florida, on the ..... day of ....., 19.....

Acknowledged from the Department of State received on ....., 19....., at ....m.

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY

.....
COUNTY ATTORNEY

BEST AVAILABLE COPY

STATE OF FLORIDA)
) SS.
COUNTY OF PALM BEACH)

I, JOHN B. DUNKLE, Clerk of the Circuit Court of the Fifteenth Judicial Circuit and ex-officio Clerk of the Board of County Commissioners of Palm Beach County, Florida, do hereby certify that the above and foregoing is a true and correct copy of Ordinance No. 79-7, An Ordinance to be known as the "Fair Share Contribution for Road Improvements Ordinance", adopted by the Board of County Commissioners at its meeting of June 19, 1979, as shown by the records of this office.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of said Board, this 25th day of July, A. D. 1979.

(SEAL)

John B. Dunkle, Clerk
Board of County Commissioners
By /s/ Marjorie B. Jennings
Deputy Clerk

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. CIVIL ACTION

CASE NO. 79 3281 CA (L) 01 A

HOME BUILDERS AND CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC., etc., et al.,
Plaintiffs,

v.

THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, et al.,
Defendants.

FINAL JUDGMENT

This matter is presented upon a complaint for declaratory and injunctive relief. Plaintiffs contend that Ordinance 79-7 (Fairshare Ordinance), which imposes an "impact fee" on new development for the purpose of financing proposed new road construction, is invalid. Plaintiffs contend that this "fee"* is not a fee at all but is in reality a tax and is therefore invalid.

The court has considered the evidence and law, all of which has been ably presented by counsel, and concludes that the "fee" is in fact a fee and is therefore valid. The pertinent facts are as follows:

On June 19, 1979 the Board of County Commissioners of Palm Beach County passed Ordinance 79-7, the "Fair Share Ordinance." The text of this ordinance and its amendment (Ordinance 81-4) is attached to this order

---

*Because the central issue here is whether the "fee" in question is a true fee rather than a tax, the court will refer to the "fee" imposed by the ordinance, or any "fee", the validity of which has been questioned, in quotation marks.

as Appendix "A". Basically, this ordinance imposes "impact fees" on new development, the money generated to be used to finance new road construction. A zone system (40 zones, approximately 6 miles square) is set up and money collected in each zone is to be spent only in that zone.

Plaintiffs then commenced this class action, seeking to declare the ordinance invalid as a taxing measure.

While this litigation was pending, the county amended Ordinance 79-7, as indicated above, but the changes were basically semantical altering some definitions and inserting language for the purpose of imparting a regulatory nature to the ordinance. The amendment also deleted the requirement that the "fee" is to be paid before the building permit is issued, and also deleted the clause of the original ordinance which declared any permit void where the "fee" is not paid.

At the outset, some basic general definitions are in order:

TAX: A payment required by government upon persons or property for the purpose of supporting government. E.g., ad valorem taxes. See *Black's Law Dictionary,* 4th Ed., pg. 1628, 5th Ed., pg. 1307.

FEE: (a) A payment imposed by government for the use of services, privileges or goods granted by government. E.g., automobile inspection fees. See *Black's Law Dictionary,* 5th Ed., pg. 553; or,

(b) A payment imposed by government for the purpose of regulation. E.g., county occupational licenses. See, *Broward County v. Janis Development Corporation,* 311 So. 2d 371, 375 (4 DCA

1975); *Bateman v. City of Winter Park,* 37 So. 2d 362 (1948); See also *Black's Law Dictionary,* 5th Ed., pg. 1078, citing *Gulf & Ship Island Railroad Co. v. Hewes,* 183 U.S. 66, 22 Sup. Court. 26, 46 L. Ed. 36 (1901).

SPECIAL ASSESSMENT*: A payment required by government imposed according to a special advantage or benefit accruing to the person or property assessed. E.g., assessment of property within a specified location for construction of street lamps. *Black's Law Dictionary,* 5th Ed., pg. 107; See also *Davies v. City of Lawrence,* 545 P. 2d 1115, 1120 (Kansas); *Lainhart v. Catts,* 75 So. 47, 52-53 (Fla. 1917).

This ordinance, as do legislative acts generally, comes to this court clothed with a presumption of validity. The court may not substitute its judgment for that of the legislative authority, as long as the legislative authority is not arbitrary, unreasonable, or discriminatory. This presumption is to be entertained not only with respect to presumed reasonableness of the ordinance's terms but also with respect to factual and legal conclusions arrived at by the legislative body. See *Gallant v. Stephens,* 358 So. 2d 536 (Fla. 1978); *Lainhart v. Catts,* supra; *Bitter v. City of Lincoln,* 85 NW 2d 302, 308 (Neb. 1957); *Rosche v. City of*

---

*Although it is not contended that this "fee" is a special assessment, certain similarities exist between the concept of special assessment and that of both a tax and a fee, thus rendering a definition of special assessment useful. Cf., e.g., the analysis in *Rosche v. City of Hollywood,* 55 So. 2d 909 (Fla. 1952) and *Fisher v. Board of County Commissioners of Dade County,* 84 So. 2d 572 (Fla. 1956) with that used in *Contractors and Builders Association of Pinellas County v. City of Dunedin,* 329 So. 2d 314 (Fla. 1976).

Hollywood, supra. The wisdom or fairness of this ordinance is not the issue.*

The threshhold issue here is whether this "fee" is in fact a fee or a tax. If a tax, the ordinance falls because the county has no authority to impose a tax such as this. If a fee, the ordinance stands because it otherwise conforms to constitutional and statutory requirements.

The validity of public levies similar to that used here has been the subject of much recent litigation in Florida and throughout the country and has been the subject of scholarly inquiry as well. See for example, *Contractors and Builders Association of Pinellas County v. City of Dunedin,* supra, (also at 312 So. 2d 763, and, 358 So. 2d 846); *Broward County v. Janis Development Corporation,* supra, (also at 49 Fla. Supp. 41); *Wald Corporation v. Metropolitan Dade County,* 338 So. 2d 863 (3rd DCA 1976); *Call v. City of West Jordan,* 606 Pa. 2d 217 (Utah 1979); *Jordan v. Village of Menomonee Falls,* 137 NW 2d 442 (Wisc. 1965), appeal dismissed 385 U.S. 4 (1966); *Homebuilders Association of Greater Kansas City v. City of Kansas,* 555 SW 2d 832 (Mo. 1977).

---

*Coincidentally, as this opinion was being prepared, an article appeared in the *Palm Beach Times,* March 24, 1982, reporting that the City of West Palm Beach has charged a couple $1,110.00 for connecting the city's water and sewerage plant to their small home. The purpose of that fee, as is the purpose of the fee in this case, is not for the *use* of sewerage services, but for capital expansion of same. It takes little imagination to realize that if this form of public finance flourishes, and if government continues to expand its functions and services as it has in the past, society will soon reach a point where "impact fees" for roads, parks, sewerage, and other forms of government services, will make it financially impossible to build any new homes at all, regardless of the fact that fees may be reasonably related to the costs of expansion. There is merit to Plaintiffs' concern on this point, but it is a concern that goes to the wisdom or fairness of the ordinance and not to its legality.

The two cases most applicable to this case are *Broward County v. Janis Development Corp.*, supra, and *Contractors and Builders Association of Pinellas County v. City of Dunedin*, supra.

Janis involved a "fee" assessed builders by the county for the purpose of building roads in "the vicinity of the project in which the charges were to be collected." That "fee" was invalidated on the ground that it was a tax rather than a fee, the court reasoning that it generated more money than was reasonably necessary to regulate the activity and that it bore no reasonable relation to the services provided. The court specifically discussed the "fee" in terms of an alleged regulatory fee, and Broward County apparently justified the fee on that ground. See, *Dunedin*,** supra at 318. Indeed, Broward's own definition of its "fee" classically described not a fee at all, but a tax: "[Broward] relies solely upon the proposition that the police power invests it with the right to exact an impact fee for the good of the *community* to provide services for the *community*. *Janis*, supra at 375 (emphasis added); Cf. definition of tax, pg. 2, this opinion.

Dunedin involved a "fee" imposed for capital improvements to that city's water and sewerage system. This "fee" was invalidated, but the holding of the case establishes that such "fees" are valid if they meet the following test:

1. New development must require that the present system of public facilities be expanded; and

2. The fees imposed on users must be no more than what the local government unit would incur in accommodating the new users of the system; and

---

**Where the term "*Dunedin*" is used it refers to the Florida Supreme Court decision cited at 329 So. 2d 314.

3. The fees must be expressly earmarked and spent for the purposes for which they were charged.

Plaintiffs contend that Janis stands for the proposition that any "fees" imposed upon builders for road construction are prohibited, and that the *Dunedin* holding permits "fees" only in utility type cases. Their interpretation of the former is too broad and of the latter too narrow.

The "fee" in *Janis* is clearly different than the "fee" here and it is also different than the "fee" in *Dunedin* as described therein:

> "Only if the monies collected in . . . *Janis* Development had been used to underwrite the administrative costs of issuing building permits, or other costs incurred in enforcing building codes, would those cases be analogous to the present one. . . . The analogy would be very close if the fees had been earmarked for future capital outlay. . . .
>
> But the fees in *Janis* . . . bore no relationship to . . . the costs of the regulation which was supposed to justify their collection. . . . In contrast, evidence was adduced here that the connection fees were less than costs *Dunedin* was destined to incur in accommodating new users. . . . We . . . (reject) the contention that such connection fees are taxes." *Dunedin,* supra at 318.*

There is nothing in *Janis* that justifies a conclusion that the court intended to absolutely invalidate "impact fees" on development for road construction. If anything,

---

*In a footnote, the court cited *Hartman v. Aurora Sanitary District,* 177 NE 2d 214, 219 (Ill. Supreme Court 1961): "We have found that such reasonable charges have been uniformly sustained *as a service charge* rather than a tax."

the fact that the court discussed the specific defects in the ordinance as it applied to the particular case would suggest that the court at the very least left the issue open. For example:

> "(T)he amount of the fee . . . is not equitable with land allocation. . . . The fee . . . is simply an exaction of money . . . for roads. . . . There are no specifics provided . . . as to where and when these monies are to be expended for roads. . . . This fee, therefore, is an exercise of the taxing power." *Janis*, supra at 375 (emphasis added).*

By the same token, there is nothing in *Dunedin* to suggest that the court intended to limit its holding to fees for water and sewerage systems or similar "proprietory" functions. Except for their discussion of the city's statutory authority to act as a corporate proprietor of its water and sewerage systems, one could easily substitute "government" for "proprietor" throughout the opinion and it would not lose its logic and continuity. Furthermore, the court distinguished cases invalidating "fees" collected for road and park purposes with no reference whatsoever to the distinction between "fees" for governmental purposes and "fees" for propriety purposes.

In a broader sense, cases involving similar methods of public levies have been decided numerous times in Florida

---

*Cf., *Village of Royal Palm Beach v. Homebuilders and Contractors Assoc., of Palm Beach County*, 15th Judicial Circuit, Case No. 79 1538, affd., 386 So. 2d 1304 (4th DCA 1980) (Fla.). In this case the court invalidated a "fee . . . to provide funds for administrative service, police protection, fire protection and maintenance service." This "fee" was invalidated not because it was collected for the wrong purpose (governmental services) but because the provisions for spending the funds were not specific enough.)

and throughout the nation. The court is unaware of any such cases which held that "impact fees", or similar public charges, otherwise valid, were invalid because they were collected in connection with, and for use of, a "governmental" as opposed to "proprietory" function.

Thus, neither *Janis* nor *Dunedin* prohibits the imposition of an "impact fee" for governmental functions, nor do they specifically permit it. The validity of such a "fee" depends not on whether the money is raised and spent for sewerage plants, roads, courthouses or what have you**. It depends simply and solely on whether the *Dunedin* test is met:

1. New development must require that the present system of public facilities be expanded; and

2. The fees imposed on users must be no more than what the local government unit would incur in accommodating the new users of the system; and

3. The fees must be expressly earmarked for the purposes for which they were charged.

**Concededly, some expenditures are so clearly "governmental" (e.g., national defense) as to be practically precluded from meeting the *Dunedin* test. The location of Camp LeJeune in Jacksonville, North Carolina, for example, probably makes that city no safer than the rest of the nation. Most public services, though, do not fit into such clear, extreme categories. They might or might not be of special benefit to the person who is required to pay for them, and this includes the providing of "personal" services, such as schools, or "governmental" services, such as police and courthouse annexes. In the latter instances, for example, the courthouse annex in Belle Glade serves the public generally, but it also serves the residents of Western Palm Beach County. The task in all these cases, as in this case, is to eschew the use of judicial shortcuts and to consider and balance the benefit to the payors as distinct from the public generally, in accordance with the *Dunedin* test, on a case by case basis, even in those cases which, like national defense, would be unlikely to qualify.

Applying that test to the "impact fee" here, it is clear that plaintiffs have failed to overcome the presumption of validity.*

Unlike other similar ordinances, such as the ones in *Janis* and *Royal Palm Beach*, this ordinance has been meticulously drafted with a view toward meeting exactly the requirements set out in *Dunedin*, viz., to expressly earmark the funds and to insure that the fees collected will be no more than what is needed to accomodate the new users of the system, all in response to a demonstrated need to expand public facilities caused by the new development. Defendant here, as Dunedin attempted to do in *Dunedin*, has made reasonable provisions to "transfer to the new user . . . a fair share of the costs new use of the system involves." *Dunedin*, supra at 317-318.

A review of the components of this ordinance demonstrates this. The "fee" required of all developers is determined by a formula, one for residential development and the other for non-residential development. The amount

---

*Conceptually, the court is concerned with the fact that the builder is required to pay a "fee" presumably in return for "benefits" (roads), but the ownership of these roads go not to the payor but they remain with the county. Thus, it would seem that the county and not the individual is the *primary* beneficiary.

To use a private property analogy, it is as if a department store customer was assessed $10 per transaction to pay for an enlargement of the department store. True, the customer would benefit from the enlargement, but the department store, by continuing to *own* the expanded building, clearly would be the *primary* beneficiary. This problem could be avoided if the payor were given a bond secured by the capital expansion. If that were done, the concerns raised by plaintiffs regarding the open assessibility of public roads, etc., would be irrelevant because then the payor would clearly be receiving a quid pro quo. As it is, plaintiff's arguments should be given great consideration, but they must be rejected in the light of *Dunedin* which imposed no such quid pro quo requirements in determining whether a "fee" such as this one is valid.

is arrived at by using a traffic impact analysis which may be prepared by the developer himself or by the county, at the developer's option. If no analysis is available, the "fee" is a fixed amount determined by the county with the help of thorough expert analysis. The formula is as follows:

A. Residential:

$$\text{Fee} = \frac{\text{External Trips divided by 2*}}{\text{Capacity}} \times \text{Cost to Construct 1 Lane for 1 Mile}$$

*Given a 50/50 directional split

B. Non-residential:

$$\text{Fee} = \frac{\text{External Trips divided by 2*}}{\text{Capacity}} \times \text{Cost to Construct 1 Lane for } \tfrac{1}{2} \text{ Mile}$$

*Given a 50/50 directional split

(a) "External Trips" is the number of trips generated by the land development activity (the trip generation rate)

(b) The "directional split" assumed for each set of trips from the land development activity is 50/50, the most conservative estimate possible.

(c) "Capacity" is the capacity of the roadway system in the year 2000.

(d) "Construction Costs" are assumed to be $300,000 per lane mile, and $150,000 per 1/2 lane mile.

(e) The average trip length assumed is one mile for residential land development activity and 1/2 mile for non-residential land development activity.

(f) The ordinance assumes capacity of the system will be 6,000 vehicles per day per lane.

Fees collected by the county are not to be spent indiscriminately but must be placed in a trust fund to be spent only for new road improvements within the zones in which they are collected. (The ordinance divides the county into 40 separate zones.) If the fees are not expended within a certain amount of time, they are to be returned.

To reiterate, the *Dunedin* test is as follows:

1. New development must require that the present system of public facilities be expanded; and

2. The fees imposed on users must be no more than what the local government unit would incur in accommodating the new users of the system; and

3. The fees must be expressly earmarked and spent for the purposes for which they were charged.

I.

NEW DEVELOPMENT MUST REQUIRE THAT THE PRESENT SYSTEM OF PUBLIC FACILITIES BE EXPANDED:

The county, in adopting this ordinance, relied upon expert consultation to arrive at its determination that new development will require expansion of the county's road system in the vicinity of the new development. Defendants have offered expert testimony to confirm this. It is admirable that the county has gone to such lengths, but it is hardly necessary. The court can take judicial knowledge that new development places new demands on the road system in its vicinity. County governments are not bound by the same strict fact finding constraints as are courts, and courts, in turn, must defer to reasonable judgments made by the county's governing body. Thus, the first part of the *Dunedin* test is easily met.

II.

THE FEES IMPOSED ON USERS MUST BE NO MORE THAN WHAT THE LOCAL GOVERNMENT UNIT WOULD INCUR IN ACCOMMODATING THE NEW USERS OF THE SYSTEM:

Somewhat more difficult, but easily met nevertheless, is the second part. The issue simply is whether the cost of meeting the increased demand can be measured in terms of dollars and whether the "fee" is less than the cost. Unquestionably this is complicated, but the criteria for validity is not mathematical precision but reasonableness. See *Lainhart v. Catts,* supra; *Bitter v. City of Lincoln,* supra. If the county were a private business (to use a *Dunedin* analogy) undoubtedly the analysis used here, or a similar one, would be useful in estimating future needs, and no private business would accept the argument that because a measurement is difficult it should not be made or relied upon. Thus, the second part of the test is met.

III.

THE FEES MUST BE EXPRESSLY EARMARKED AND SPENT FOR THE PURPOSES FOR WHICH THEY WERE CHARGED:

Undoubtedly the third part is the most difficult to meet and will probably prove to be the most contested in future cases testing the validity of this form of public finance. Failure to meet this test has been the primary reason why similar ordinances have been invalidated. For example:

> "The fee here is simply an exaction of money to be put in trust for roads. . . . There are no other requirements. There are *no specifics* provided in the ordi-

nance *as to where and when these monies are to be expended for roads. . . .*" *Janis,* supra at 375 (emphasis added).

"5. The court finds . . . that the ordinance is vague and ambiguous in that there are *no specifics* provided for in the ordinance *as to where and when the monies collected* . . . are to be expended. . . . There is no requirement in the ordinance *restricting the use* of the money to services to be provided *to those areas and persons from whom the money is exacted.*" *Village of Royal Palm Beach,* supra. (emphasis added).

[Imposition of an impact fee] is permissable where expansion is reasonably required, if use of the money collected is limited to meeting the costs of expansion.

. . .

"If the ordinance in the present case had so restricted the use of the fees which it required to be collected, there would be little question as to its validity." *Dunedin,* supra at 320-21. (emphasis added).

This Fair Share Ordinance divides the county into 40 zones and specifies that when fees are paid they are to be deposited into a separate trust fund established for the zone from which the fees have been collected. Monies withdrawn from these trust funds may be spent only for construction or improvement of the roads on the county's major road network system, that is, all arterial and collector roads in Palm Beach County, and must be spent exclusively within the zone from which the fees are collected.

That these funds are specifically earmarked cannot be seriously questioned, even though the method used by the county may not be perfect. Perfection is not required for validity. Plaintiffs contend, however, that roads, being

open to the public generally, are not properly subject to the sort of analysis that attempts to determine whether a payor receives an appropriate benefit in return for the "fee" he pays. This argument deserves careful consideration, but must ultimately be rejected.

Defendant maintains that payors of these "fees" receive special benefits sufficient to justify collection. Plaintiffs deny this, claiming that the public generally, or at least the non-payors within the zones, benefit equally from road construction because roads are open to everyone. Although neither party has contended that this "fee" is a special assessment rather than a fee, the two methods of public financing are similar, and special assessment cases as well as eminent domain cases, as analogies.

Actually, in many respects this "fee" looks more like a special assessment (which is a form of taxation) than a fee because benefits received by payors appear to be more in the nature of a "special advantage" which is terminology used in special assessment cases, rather than a direct receipt of services, but plaintiffs do not contend that this "fee" is a special assessment and no case evaluating similar "fees" has suggested that the "fees" are in reality special assessments or special taxes. See, for example, *Jordan v. Village of Menomonee Falls,* supra; *Associated Homebuilders of the Greater East Bay, Inc., v. Walnut Grove,* 484 P. 2d 606 (Calif. 1971); *Homebuilders Association of Greater Kansas City v. City of Kansas,* supra; *Call v. City of West Jordan,* supra; See, also, cases discussed in *City of Dunedin v. Contractors & Builders Association of Pinellas County,* 312 So. 2d 763, (2nd DCA 1975).

Jordan v. Village of Menomonee Falls, e.g., involved an ordinance conditioning subdivision approval on dedication of land or payment of a "fee" for schools, parks and

recreation sites. The contention there was that the ordinance constituted a tax because the dedication or "fee" would be applied to facilities that were not specifically and uniquely attributable to the subdivision. The court rejected this argument and observed as follows:

> *In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or school site was to meet a need solely attributable to the anticipated influx of people in the community to occupy this particular subdivision.* On the other hand, the municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications required of the subdividers be utilized for school, park and recreational purposes for the benefit of such influx. In the absence of contravening evidence *this would establish a reasonable basis for finding that the need for the acquisition was occasioned by the activity of the subdivider.* (at 447) (emphasis added).

Call v. City of West Jordan likewise addressed itself to this problem:

> "We agree that the dedication should have some reasonable relationship to the needs created by the subdivision. . . . But is so plain as to hardly require expression that if the purpose of the ordinance is properly carried out, it will redound to the benefit of the subdivision as well as to the general welfare of the whole community. *The fact that it does so, rather than solely benefiting the individual subdivision, does not impair the validity of the ordinance.* at 220) (emphasis added).

Dunedin itself does not even suggest that the "fee" in that case was a special assessment even though the "fees" were not used for specific services but for *capital improvements* which, of course. inured to the benefit of the community generally, as do roads, parks, public buildings and the like. But the reasoning used by *Dunedin* to uphold the "fee" is identical to the reasoning used in cases upholding the validity of special assessments. The holding in *Dunedin* would have been the same even if sewerage services were furnished to residents not only as a direct service to *them* but, also, to the *community* as a public health requirement. See, *City of St. Petersburg v. Briley, Wild & Associates, Inc.*, 239 So. 2d 817, (Fla. 1970). The payors in *Dunedin* would have been required to pay, and would have received a special benefit from the capital improvements, even if they had no real immediate use for the connections. See, *City of Hallandale v. Meekins*, 237 So. 2d 318 (4th DCA 1970), Cert. discharged, 245 So. 2d 253 (Fla. 1971). (Dogtrack property that forseeably could be developed as condominium held to benefit from nearby sewerage system.).

Thus, because the payor of a "fee" such as this has been shown to have received a proportional special benefit, the third part of the *Dunedin* test is met.

Furthermore, even though this "fee" might to fairly described as a special assessment, it can also be fairly described as a fee. The question is not whether one is more accurate than the other but whether plaintiffs have presented sufficient evidence to overcome the presumption of correctness. See *Atlantic Coastline R.R. Company v. City of Lakeland*, 115 So. 2d 669 (Fla. 1928); *Lainhart v. Catts*, supra.

Also, unlike most special assessments which are assessed against all property owners, within a geographical area, this "fee" is assessed only against *new* developers. This is a reasonable classification because only the new developers have created the necessity for new road construction. This reasonableness lends support to defendants' contention that payors have received a special benefit over and above that enjoyed by existing property owners. Without the newly created demand, old users would have no need for the new construction. See *Call v. City of Jordan,* supra.

The question here, then, is not whether this "fee" is in fact a fee or a special assessment, but whether this "fee" meets the *Dunedin* test, that is, whether persons who pay this "fee" receive sufficient benefits to justify its exaction. The evidence establishes that they do. See *Dunedin,* supra; Cf., *City of Tallahassee v. Baker,* 153 So. 2d 875, (Fla. 1951) (an eminent domain case holding that road improvements decrease property values and thus justified compensation); *Bodner v. City of Coral Gables,* 245 So. 2d 250 (Fla. 1971) (when real property abuts, or falls *within the protective proximity* of the improvement, a presumption arises from the nature and purpose of the improvement that the property benefits.) (emphasis added); see also *City of Hallandale v. Meekins,* supra.

For these and other reasons which have been exceptionally well argued to the court by counsel on both sides, the court finds the following:

1. The court has jurisdiction of this cause and the parties.

2. Plaintiffs failed to rebut by a preponderance of the evidence the presumption of validity of Palm Beach

County Ordinance #79-7, as amended by Ordinance #81-4.

3. Palm Beach County has authority under Section 125.01(1)(m), and, under Section 163.3161 et seq., Florida Statutes and supporting cases, to enact Palm Beach County Ordinance #79-7 as amended by Ordinance #81-4.

4. The fair share fee requirements contained in Palm Beach County Ordinance #79-7 as amended by Ordinance #81-4 constitutes a valid fee and not a tax.

5. Plaintiffs failed to prove by a preponderance of the evidence that the ordinance is unlawfully vague, arbitrary, unreasonable or discriminatory.

6. Plaintiffs failed to prove by a preponderance of the evidence that the ordinance violates the due process and the equal protection provisions of the Florida or United States Constitution.

7. Plaintiffs failed to prove by a preponderance of the evidence that the fair share fee requirements of the ordinance constitute double taxation under Florida law.

8. Plaintiffs failed to prove by a preponderance of the evidence that the fair share fee requirements of the ordinance violates Section 125.56(2), Florida Statutes.

It is thereupon

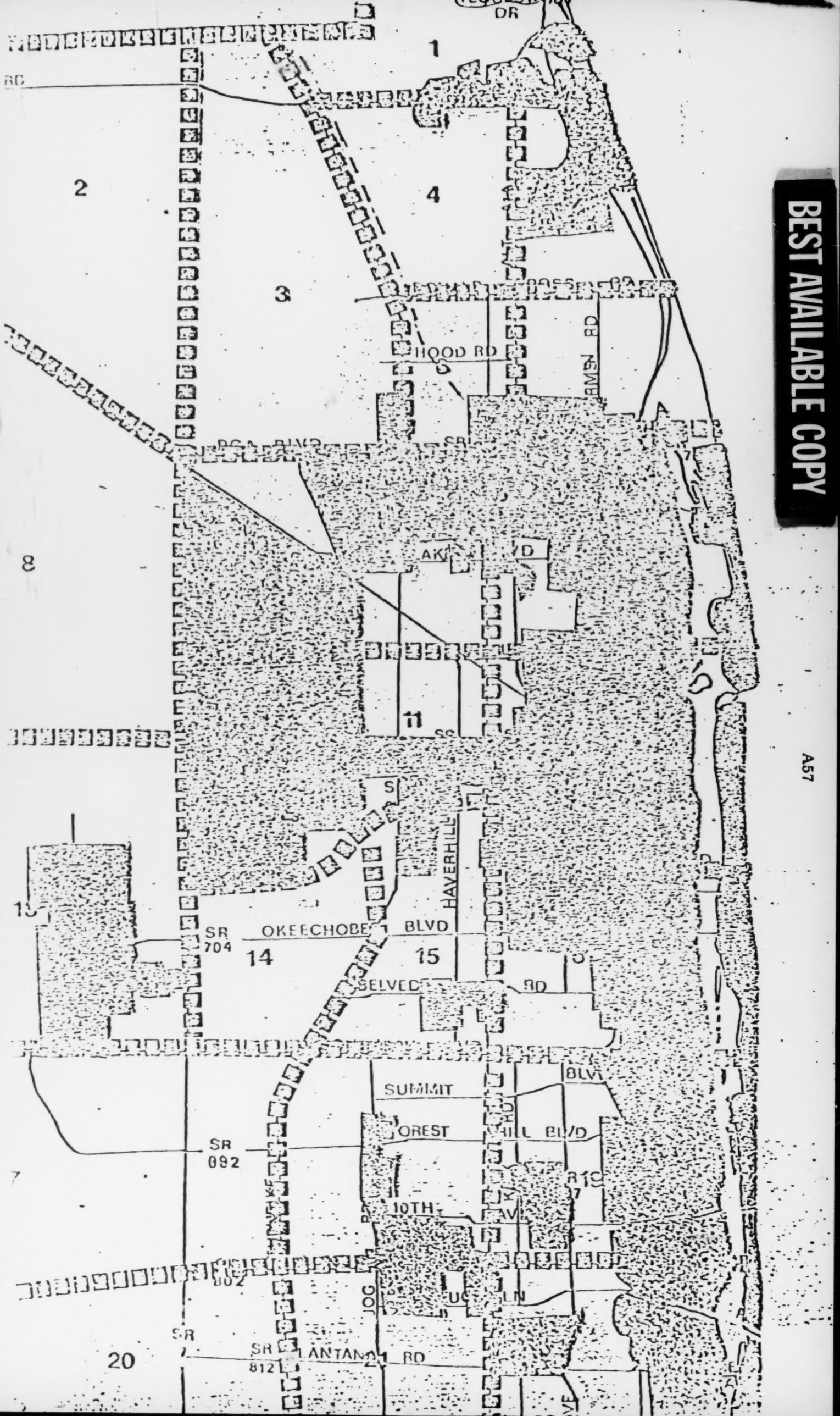
ORDERED AND ADJUDGED as follows:

A) Plaintiffs, HOMEBUILDERS AND CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC., and TED SATTER ENTERPRISES, INC., in their individual and representative capacities, take nothing by their complaint as amended and shall go hence without day.

B) Defendants may within 30 days hereafter file a motion to tax costs as they may be advised.

DONE AND ORDERED this 26th day of March, 1982 at Palm Beach County, West Palm Beach, Florida.

/s/ Lewis Kapner,
Lewis Kapner, Circuit Judge



BEST AVAILABLE COPY

IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

CASE NO. 64,960

HOME BUILDERS AND CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC., a Florida corporation, individually and on behalf of all others similarly situated, and Ted Satter Enterprises, Inc., a Florida corporation,

Appellants,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, Bill Bailey, as Chairman of said Board of County Commissioners, Dennis P. Koehler, Peggy B. Evatt, Frank Foster, and Norman Gregory, as Members of said Board of County Commissioners and George R. Brockway, Building Official of Palm Beach County, Edgar Howell, Building Official of City of Boynton Beach, Roy Reid, Building Official of City of Delray Beach, and Alvin Butterfield, Building Official of Village of Tequesta,

Appellees.

NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

Home Builders and Contractors Association of Palm Beach County, Inc., a Florida corporation, individually and on behalf of all others similarly situated, and Ted Satter Enterprises, Inc., a Florida corporation, appeal the decision of this Court entered on June 20, 1984, to the United States Supreme Court, under 28 U.S.C. Section 1257 (2).

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 21st day of August, 1984, to:

CHARLES F. SCHOECH
County Attorney
Suite 307
Pan American Building
West Palm Beach, FL 33401

EDWARD F. RYAN
Burke Bosselman Freivogel
Weaver Glaves & Ryan
55 W. Monroe Street, Suite 800
Chicago, ILL 60603

BURKE BOSSELMAN FREIVOGAL
WEAVER GLAVES & RYAN
P. O. Box 1808
Boca Raton, FL 33429

CLYDE L. HEATH, Clerk,
Fourth District Court
of Appeal
Post Office Box A
West Palm Beach, FL 33402

JOHN B. DUNKLE, Clerk
Palm Beach County Courthouse
300 North Dixie
West Palm Beach, FL 33401

STEPHEN W. METZ
P. O. Box 1259
Tallahassee, FL 32302

JIM SMITH, Attorney General
State of Florida
The Capitol
Tallahassee, FL 32301

The above parties or attorneys are all who are required to be served.

Grover C. Herring,
James L. Watt
Arnstein, Gluck & Lehr
1655 Palm Beach Lakes Blvd.
Suite 904, Forum III
West Palm Beach, Florida 33401
(305) 689-3900

and

Larry Klein
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, Florida 33401
(305) 659-5455

By /s/ Larry Klein
Larry Klein

Office - Supreme Court, U.S.
FILED
OCT 13 1984
ALEXANDER L. STEVAS
CLERK

No. 84-412

In the

Supreme Court of the United States

OCTOBER TERM, 1984

HOME BUILDERS AND CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC., a Florida corporation, individually and on behalf of all others similarly situated, and Ted Satter Enterprises, Inc., a Florida corporation,

Appellants,

vs.

The BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, Bill Bailey, as Chairman of said Board of County Commissioners, Dennis P. Koehler, Peggy B. Evatt, Frank Foster, and Norman Gregory, as Members of said Board of County Commissioners, and George R. Brockway, Building Official of Palm Beach County, Edgar Howell, Building Official of City of Boynton Beach, Roy Reid, Building Official of City of Delray Beach, and Alvin Butterfield, Building Official of Village of Tequesta,

Appellees.

On Appeal From The Supreme Court Of Florida

MOTION TO DISMISS

CHARLES F. SCHOECH
County Attorney
P.O. Box 1989
West Palm Beach,
Florida 33402
(305) 837-3649
FRED P. BOSSELMAN
NANCY E. STROUD
STEVEN M. ELBOD
BURKE, BOSSELMAN,
FREIVOGEL, WEAVER,
GLAVES & RYAN
Of Counsel
October 10, 1984

EDWARD F. RYAN
BURKE, BOSSELMAN,
FREIVOGEL, WEAVER,
GLAVES & RYAN
55 West Monroe Street
Suite 800
Chicago, Illinois 60603
(312) 263-3600
Counsel for Appellees

BEST AVAILABLE COPY

The Scheffer Press, Inc.—(312) 263-6850

QUESTIONS PRESENTED

1. Whether a decision rendered by the Florida Supreme Court, which rests on adequate non-federal grounds and involves no federal constitutional issues, is reviewable by this Court.

2. Whether a substantial federal question is presented with respect to a county impact fee for road improvements when such fee is reasonably related to a legitimate purpose.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Motion to Dismiss	1
Statement of the Case	2
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

PAGE

CASES:

Agins v. *City of Tiburon*, 447 U.S. 255 (1980) 4

Armstrong v. *City of Tampa*, 106 So.2d 407 (Fla. 1958) 5

Associated Home Builders v. *City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606 (1977) 8

Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937) 8

City of New Orleans v. *Dukes*, 427 U.S. 297 (1976) .. 6

Clark v. *Paul Gray, Inc.*, 306 U.S. 583 (1939) 8

County Board of Arlington County v. *Richards*, 434 U.S. 5 (1977) 9

Ft. Smith Light & Traction Co. v. *Board of Improvement*, 274 U.S. 387 (1927) 8

Herb v. *Pitcairn*, 324 U.S. 117 (1945) 4

Hodel v. *Indiana*, 452 U.S. 314 (1981) 8

Holt Civic Club v. *City of Tuscaloosa*, 439 U.S. 60 (1978) 9, 10

New York ex rel. Bryant v. *Zimmerman*, 278 U.S. 63 (1928) 7

San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 9

PAGE

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. XIV ..... *passim*

Fla. Const. Art. VII, § 1(f) (1980) 7

Fla. Const. Art. V, § 3 (1980) 4

STATUTES AND ORDINANCES:

Fla. R. App. Proc. §9.030(a)(2)(A) 5

Palm Beach County Ordinance No. 79-7 (July 9, 1979), as amended ..... *passim*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-412

HOME BUILDERS AND CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC., a Florida corporation, individually and on behalf of all others similarly situated, and Ted Satter Enterprises, Inc., a Florida corporation,

Appellants,

vs.

The BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, Bill Bailey, as Chairman of said Board of County Commissioners, Dennis P. Koehler, Peggy B. Evatt, Frank Foster, and Norman Gregory, as Members of said Board of County Commissioners, and George R. Brockway, Building Official of Palm Beach County, Edgar Howell, Building Official of City of Boynton Beach, Roy Reid, Building Official of City of Delray Beach, and Alvin Butterfield, Building Official of Village of Tequesta,

Appellees.

On Appeal From The Supreme Court Of Florida

MOTION TO DISMISS

Appellees in the above-entitled case move to dismiss the appeal herein on the ground that no federal question was raised in the Supreme Court of Florida or, alternatively, on the ground that no substantial federal question exists.

STATEMENT OF THE CASE

On June 19, 1979, the Board of County Commissioners of Palm Beach County adopted the Fair Share Contribution for Road Improvement Ordinance (the "Fair Share Ordinance").[1] The Fair Share Ordinance imposes an impact fee on new land developments that generate vehicular traffic. The impact fee was enacted by Palm Beach County to provide for the construction and improvements of roads made necessary by the increased traffic generated by such new development.

On August 15, 1979, Appellants filed a complaint in the Circuit Court of Palm Beach County, Florida challenging the validity of the Fair Share Ordinance and seeking declaratory and injunctive relief and damages. After a full trial on the merits, the Circuit Court entered a judgment finding the Fair Share Ordinance to be valid.[2] Appellants then appealed to the Fourth District Court of Appeal of the State of Florida and on October 12,

---

[1] The Fair Share Ordinance, Palm Beach County Ordinance No. 79-7, became effective July 9, 1979. It was amended on April 7, 1981 by Palm Beach County Ordinance No. 81-4 and became effective April 20, 1981. A composite ordinance has been included in the Appendix to Appellants' Jurisdictional Statement filed with this Court on September 20, 1984.

[2] A copy of the written opinion filed by the Circuit Court of Palm Beach County is in the Appendix to Appellants' Jurisdictional Statement at p. A-38.

1983, the District Court of Appeal filed its opinion upholding the validity of the Fair Share Ordinance.[3]

On March 5, 1984, Appellants submitted a Brief on Jurisdiction to the Supreme Court of the State of Florida seeking to invoke that Court's discretionary jurisdiction pursuant to the applicable provisions of the Florida Constitution and the Florida Rules of Appellate Procedure. On June 20, 1984, the Supreme Court of Florida entered its decision declining to accept jurisdiction pursuant to the applicable provisions of the Florida Constitution.[4]

Appellants now seek to invoke the jurisdiction of this Court to review the decision of the Florida Supreme Court.

---

[3] A copy of the District Court of Appeal's opinion is in the Appendix to Appellants' Jurisdictional Statement at p. A-3.

[4] A copy of the Supreme Court of Florida's decision is in the Appendix to Appellants' Jurisdictional Statement at p. A-1.

ARGUMENT

I. THE DECISION OF THE FLORIDA SUPREME COURT RESTED ON ADEQUATE NON-FEDERAL GROUNDS AND INVOLVED NO FEDERAL QUESTIONS.

This Court will not review state court judgments that rest on independent state grounds. *Herb* v. *Pitcairn,* 324 U.S. 117 (1945). Moreover, a state court decision which does not raise a federal question is not appropriate for review by this Court. *Agins* v. *City of Tiburon,* 447 U.S. 255, 259, n. 6 (1980).

The Appellants have clearly characterized the instant appeal as being an appeal from the decision rendered by the Supreme Court of Florida on June 20, 1984, not from the decision of the Florida District Court of Appeal. The Florida Supreme Court decision concerned that Court's determination that it should decline to accept jurisdiction to review the decision of the District Court of Appeal. The Florida Supreme Court was never asked to, and therefore did not, consider the validity of any state statute or local ordinance, including the Fair Share Ordinance, under the Constitution, treaties or laws of the United States. Rather, it was asked by Appellants to determine whether adequate grounds existed under the Constitution and laws of the State of Florida for the exercise of its discretionary jurisdiction. Clearly, no federal question was decided.

The Florida Supreme Court is one of limited jurisdiction. Fla. Const. Art. V, § 3 (1980). It may only hear appeals in the limited circumstances provided by the

Florida Constitution and Rules of Appellate Procedure. In the proceeding below, Appellants requested the Florida Supreme Court to invoke its jurisdiction on the grounds that the District Court of Appeal's decision expressly construed a provision of the federal and state constitutions and conflicted with a decision of the Florida Supreme Court.[5] The Florida Supreme Court decided, based on settled Florida law, that no such express construction or conflict existed[6] and therefore declined to accept jurisdiction. Such a decision is not appropriate for review by this Court.

II. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Even assuming, *arguendo,* that the Florida Supreme Court decision, or any decision rendered by the courts in the proceedings below, raised or involved a federal question, such question is so insubstantial as to make review by this Court inappropriate.

Appellants assert that this appeal should receive plenary consideration by this Court because the Fair Share Or-

---

[5] The Florida Rules of Appellate Procedure provide that the discretionary jurisdiction of the Florida Supreme Court may be sought to review decisions of district courts of appeal that, *inter alia,* "expressly construe a provision of the state or federal constitution" or "expressly and directly conflict with a decision of . . . the [Florida] Supreme Court on the same question of law." Fla. R. App. Proc. §9.030(a)(2)(A)(ii), (iv).

[6] The Florida courts have interpreted the "express construction" provision as requiring an actual and novel construction of a constitutional provision in order to sustain the jurisdiction of the Florida Supreme Court. *See, Armstrong* v. *City of Tampa,* 106 So.2d 407, 409-10 (Fla. 1958).

dinance purportedly violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Appellants do not even pretend that a fundamental right or suspect class distinction exists in the instant case. Accordingly, the Fair Share Ordinance must be upheld if it has any rational basis. *City of New Orleans v. Dukes,* 427 U.S. 297 (1976).

Palm Beach County's purpose in enacting the Fair Share Ordinance is to ameliorate a modest share of the cost of the extensive road network improvements that will be necessary as a result of the phenomenal development and growth rate which Palm Beach County is experiencing. As the record below clearly establishes, Palm Beach County is the most rapidly growing county in the nation. The record also shows that the traffic generated from such growth has created, and will continue to create, the need for costly capital improvements. The Fair Share Ordinance is an attempt by Palm Beach County to finance some of these costs by requiring new land development activity to pay a fee equivalent to, but not in excess of, the pro rata share of the reasonably anticipated expansion costs of new roads and other facilities.

It is particularly revealing to note that Appellants do not now challenge, and indeed never have challenged, the validity or legitimacy of Palm Beach County's goal and purpose in adopting the Fair Share Ordinance.

Essentially, Appellants argue that the Fair Share Ordinance, despite its proper purpose, violates the Equal Protection Clause because it is underinclusive in two separate ways, both of which, when analyzed under the rational basis test, are without merit.

Appellants' first theory is that the Fair Share Ordinance includes only the people who pull building permits in cities covered by the Fair Share Ordinance and not people who pull building permits in cities which have elected to be excluded from the Fair Share Ordinance.[7]

Appellants' second theory is that the Fair Share Ordinance results in a disparity between people who benefit from and people who pay the impact fee. This theory is based on the undeniable fact that roads can be traveled on by anyone and not simply the residents of the zone that are paying the fee.[8]

---

[7] This theory appears to be based on the fact that the Florida Constitution permits municipalities, in the words of Appellants, to "opt out" of county ordinances. The Florida Constitution authorizes non-charter counties such as Palm Beach County to adopt ordinances having county-wide effect, but such ordinances take effect in municipalities only to the extent that the municipality chooses not to adopt a conflicting ordinance. Fla. Const. Art. VIII, § 1(f). However, the validity or constitutionality of the Florida Constitution provision is not now and never has been at issue in this case and, therefore, not a proper issue for review by this Court. *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63 (1928).

Moreover, Appellees note that it is not necessarily true that the Fair Share Ordinance results in a disparity between local governments. Because a municipality that has "opted out" of the Fair Share Ordinance is always free to adopt its own road impact fee, which may be higher or lower than the county's, it is not proper to assume, as Appellants do, that the city resident "pays nothing."

[8] As the District Court of Appeal correctly observed in the proceeding below, this type of argument is frequently made by those attacking impact fees and is generally rejected. *See,* Juris. Statement App. at A-9. Indeed, the

The critical flaw in both of Appellants' arguments becomes clearer when analyzed under the settled equal protection principles established by the United States Supreme Court.

Where no suspect classification or constitutionally protected right is involved, challenges to state or local fees are measured by the same standards as challenges to state taxes. *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 595 (1939). The Court has given states the widest possible latitude in making classifications for tax purposes. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937):

> A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

The fact that an exaction is limited to a particular geographic subdivision of the state does not create an equal protection violation. *Ft. Smith Light & Traction Co.* v. *Board of Improvement*, 274 U.S. 387, 391 (1927). *See, also, Hodel* v. *Indiana*, 452 U.S. 314, 333 (1981) ("[a] claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact"). Nor does the fact that a state allows different local governments to choose their own and differing means of raising revenue violate

---

[8] (Continued)
only case cited by Appellants in support of this theory, *Associated Home Builders* v. *City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606 (1977), actually undermines Appellant's argument. In *Walnut Creek*, the California Supreme Court *validated* a fee for the creation of parks which are, like the roads in the instant case, open to all.

equal protection. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 42 (1973) (the Court "does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause"). Finally, it is clear that a state has extraordinarily wide leeway in allocating powers among its local governmental units. *Holt Civic Club* v. *City of Tuscaloosa,* 439 U.S. 60, 72 (1978). And, the fact that actions of one unit may impact nonresidents does not violate equal protection. *County Board of Arlington County* v. *Richards,* 434 U.S. 5 (1977).

That the Fair Share Ordinance contemplates a perfectly permissible local regulation is clear from even a brief review of Supreme Court decisions using the foregoing equal protection principles to uphold state and local regulation.

In *San Antonio Independent School District* v. *Rodriguez, supra,* the Court refused to upset a state's fiscal structure even when the plaintiffs had shown extensive evidence of differing impact on different groups. There, the plaintiffs had proved that the state's scheme of property taxation actually had a discriminatory impact on persons of lower income. The Court reasoned, however, that since the goals were valid and since no fundamental right or suspect class was involved, the discriminatory impact found to exist was not unconstitutional. 411 U.S. at 42. Unlike the *Rodriguez* plaintiffs, Appellants in the instant case have not even presented evidence of actual impacts on different groups but rather have merely pointed to the abstract possibility of differing impacts.

In *County Board of Arlington County* v. *Richards, supra,* the Court, in a *per curiam* decision, upheld local

legislation establishing fees for parking on public streets, which actually prohibited the use of public roads for parking by non-residents. The Appellants here are only being asked to pay a fee to contribute to the cost of roads.

In *Holt Civic Club* v. *City of Tuscaloosa, supra,* the Court upheld state legislation that explicitly gave the voters of one jurisdiction extraterritorial powers to control development in neighboring jurisdictions. Appellants here have only complained of potential and indirect impacts on the residents of other jurisdictions.[9]

The fees and regulations upheld against equal protection challenges in each of the foregoing cases involved differing impacts of apparently great significance and direct consequence. However, the Court reasoned in each case that the rational basis test allows the states to choose fiscal and regulatory systems appropriate to their needs, despite disparities of impact. Certainly the Ordinance at issue in the instant case involves no more disparity of impact than was involved in the above-cited decisions of this Court.

---

[9] Indeed, the impacts alleged by Appellants might not even exist at all. Appellants' argument is premised on the assumption that those who pay the fees will not benefit by road improvements in nearby municipalities which have "opted out." Jurisd. Statement at pp. 6-7. The fact, however, which was clearly established in the proceedings below, is that roads are of countywide benefit. Those who pay the fee will therefore be benefited by nearby road improvements *regardless* of whether such road improvements are within a municipality that has "opted in" or "opted out" of the Fair Share Ordinance.

CONCLUSION

For the foregoing reasons, Appellees respectfully move the Court to dismiss the frivolous and unsubstantiated appeal filed by Appellants.

Respectfully submitted,

CHARLES F. SCHOECH
County Attorney
P.O. Box 1989
West Palm Beach,
Florida 33402
(305) 837-3649

FRED P. BOSSELMAN
NANCY E. STROUD
STEVEN M. ELROD
BURKE, BOSSELMAN,
FREIVOGEL, WEAVER,
GLAVES & RYAN
Of Counsel

EDWARD F. RYAN
BURKE, BOSSELMAN,
FREIVOGEL, WEAVER,
GLAVES & RYAN
55 West Monroe Street
Suite 800
Chicago, Illinois 60603
(312) 263-3600
Counsel for Appellees

No. 84-412

Office - Supreme Court, U.S.
FILED
OCT 20 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

October Term, 1984

HOME BUILDERS AND CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC., a Florida corporation, individually and on behalf of all others similarly situated, and Ted Satter Enterprises, Inc., a Florida corporation,

Appellants,

vs.

The BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, Bill Bailey, as Chairman of said Board of County Commissioners, Dennis P. Koehler, Peggy B. Evatt, Frank Foster, and Norman Gregory, as Members of said Board of County Commissioners and George R. Brockway, Building Official of Palm Beach County, Edgar Howell, Building Official of City of Boynton Beach, Roy Reid, Building Official of City of Delray Beach, and Alvin Butterfield, Building Official of Village of Tequesta,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

GROVER C. HERRING
JAMES L. WATT
ARNSTEIN, GLUCK & LEHR
1655 Palm Beach Lakes Blvd.
Suite 904
West Palm Beach, Florida 33401
(305) 689-3900

and

LARRY KLEIN (*Counsel of Record*)
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, Florida 33401
(305) 659-5455

Attorneys for Appellants

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellants respond to the two issues raised in the motion to dismiss. References to the appendix shall mean the appendix in our jurisdictional statement.

ARGUMENT

I.

DID THE DECISION OF THE FLORIDA SUPREME COURT REST ON ADEQUATE NON-FEDERAL GROUNDS AND INVOLVE NO FEDERAL QUESTIONS?

The opinion of the Fourth District Court of Appeal, State of Florida, expressly held that the ordinance did not violate the equal protection provisions of the Federal Constitution (A 9-11).

Appellees state on page 4 that the Florida Supreme Court was not asked to consider the validity of the ordinance under the Federal Constitution. This is not true. We have attached as an appendix to this brief copies of pages 7 through 10 of appellants' brief filed in the Florida Supreme Court which raised the Federal constitutional question.

II.

IS A SUBSTANTIAL FEDERAL QUESTION PRESENTED?

Appellees do not argue that a Federal question is not presented, only whether the question is substantial. It is significant that appellees do not dispute what this ordi-

nance does. Appellees do not deny that a person pulling a building permit in one city must pay a fee which can be used to improve roads in another city where there is no fee charged. Appellees do not dispute that any city can opt out of this ordinance. Appellees do not dispute that only those pulling building permits in 4 of 37 cities, or in the unincorporated area of the County, must pay the impact fee, and that these funds can be used to improve roads anywhere in a 9-square mile zone, the boundaries of which have no relationship to the boundaries of cities. This Court has never permitted residents of one city to be taxed for the benefit of residents of another city.

On page 9 appellees suggest that we have not presented evidence of actual impact on different groups. This is because the trial court enjoined the County from enforcing this ordinance and, because the County itself was in substantial doubt as to whether this ordinance was constitutional, the County has never implemented the ordinance. The fees which were collected prior to the injunction being entered have not been spent, nor have fees been collected during the appellate process. The County should be commended for taking this approach, however we are compelled to point it out in response to the appellees' motion to dismiss.

CONCLUSION

The motion should be denied.

Respectfully submitted,

GROVER C. HERRING
JAMES L. WATT
ARNSTEIN, GLUCK & LEHR
1655 Palm Beach Lakes Blvd.
Suite 904
West Palm Beach, Florida 33401
(305) 689-3900

and

LARRY KLEIN (*Counsel of Record*)
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, Florida 33401
(305) 659-5455

Attorneys for Appellants

APPENDIX

POINT II

THE ORDINANCE IS ARBITRARY AND DISCRIMINATORY AND DENIES EQUAL PROTECTION.

In addition to conflict jurisdiction this Court also has discretionary jurisdiction to review decisions which construe the State and Federal Constitutions under Rule 9.030(a)(2)(A)(ii). In the present case the Fourth District, on pages 5 to 7, construed the equal protection clauses of the Florida and Federal Constitutions not to prohibit the type of discrimination inherent in the ordinance.

In *Osterndorf v. Turner,* 426 So.2d 539 (Fla. 1982), this Court stated on page 545:

> . . . We find there is no rational basis for distinguishing between *bona fide residents* of more than five consecutive years and *bona fide residents* of less than five consecutive years in the payment of taxes on their homes. This disparate treatment of resident homeowners cannot be allowed if our equal protection clause is to have any real meaning. (Emphasis supplied)

If there is no rational basis to distinguish between five year residents and one year residents, there is also no rational basis to distinguish between one who purchases a new home (with an impact fee of $300) and one who purchases a used home (with no impact fee) where the fee is used to improve roads which are open to both homeowners and the general public.

In *Dunedin,* on page 321, this Court stated:

> . . . It is arbitrary and irrational to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant. . . .

In addition to discrimination between old and new users of the roads, which denies equal protection, there is also an arbitrary distinction made between new users (those pulling building permits), which stems from the fact that Palm Beach County is non-charter and Article VIII, Florida Constitution, Section 1(f), allows cities in non-charter counties to exclude themselves from the application of county ordinances. In the present case 33 of the 37 municipalities in the county have opted out. The fees are thus assessed in only four cities.

A copy of a portion of a trial exhibit is included in our appendix on page 28 which reflects the northeastern area of Palm Beach County, showing the geographical zones provided in the ordinance and also showing municipalities which have opted out as being shaded. There are shaded areas (cities which have opted out) in almost every zone. Under the ordinance those pulling building permits in cities which have opted out do not pay the fee, however the funds can be used to improve roads anywhere in that geographical zone, even within the borders of the city which has opted out.

In zone 1 of this exhibit a portion of a city which has opted out of the ordinance is included in the zone. Thus a person who builds a new home in the city in zone 1 does not pay the $300 fee. The person who builds a new home in that portion of zone 1 which is not in the city does pay the fee. The money can be used to improve any through roads in the entire zone, even those within the city limits where residents don't pay.

In *Department of Revenue v. Amrep Corporation*, 358 So.2d 1343, 1353 (Fla. 1978), this Court on page 1353 struck down an intangible tax on accounts receivable because:

> . . . the unequal treatment of identical receivables is based solely on the residence of the parent and is not differentiated in any way on the basis of where the receivable arose or its actual contacts with the State of Florida.

In *Wiggins v. City of Jacksonville*, 311 So.2d 406 (Fla. 1st DCA 1975), Jacksonville passed an ordinance grandfathering in persons having plumbers licenses from a particular town and a plumber from another town challenged the ordinance on the ground that he was denied equal protection. The court held the ordinance invalid because "by accident of geographical location" some plumbers were discriminated against.

In the present case a person pulling the building permit in an unincorporated area of the county will pay a $300 fee, while his neighbor down the street, who happens to be within the boundaries of a city which has opted out, will not pay the fee. It is difficult to conceive of a more blatant example of denial of equal protection.

CONCLUSION

The decision of the Fourth District approving an impact fee for roads not only conflicts with *Dunedin*, but creates confusion in the law which this Court should resolve. The ordinance is also unconstitutional as being arbitrary and discriminatory. Although the Fourth District refused to certify this question as one of great public interest, it is respectfully submitted that it is such an issue, since other governmental agencies will undoubtedly follow the example of Palm Beach County and enact similar or-

dinances. This Court should therefore review this case on the merits.

GROVER C. HERRING,
JAMES L. WATT
ARNSTEIN, GLUCK & LEHR
1655 Palm Beach Lakes Blvd.
Suite 904
West Palm Beach, FL 33401
(305) 689-3900

LARRY KLEIN
Suite 201 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

By /s/ Larry Klein
Larry Klein

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail, this 5th day of March, 1984, to:

CHARLES F. SCHOECH
County Attorney
Suite 307
Pan American Building
West Palm Beach, FL 33401

BURKE BOSSELMAN FREIVOGEL WEAVER GLAVES & RYAN
P. O. Box 1808
Boca Raton, FL 33429

EDWARD F. RYAN
Burke, Bosselman, Freivogel, Weaver, Glaves & Ryan
55 West Monroe Street
Suite 800
Chicago, ILL 60603

STEPHEN W. METZ
P.O. Box 1259
Tallahassee, FL 32302

/s/ Larry Klein
Larry Klein